

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

\* \* \* \* \*

ELEANOR McCULLEN, et al \*  
Plaintiffs, \*

vs. \*

CIVIL ACTION  
No. 08-10066-JLT

MARTHA COAKLEY, \*  
Attorney General for the \*  
Commonwealth of Mass. \*  
Defendant. \*

\* \* \* \* \*

BEFORE THE HONORABLE JOSEPH L. TAURO  
UNITED STATES DISTRICT JUDGE

**DAY ONE**  
**BENCH TRIAL**

A P P E A R A N C E S

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for the plaintiffs  
By: Michael J. Deprimo, Esq.

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Courtroom No. 22  
John J. Moakley Courthouse  
1 Courthouse Way  
Boston, Massachusetts 02210  
August 24, 2011  
10:10 a.m.

**APPEARANCES, CONTINUED**

MASSACHUSETTS ATTORNEY GENERAL'S OFFICE  
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P R O C E E D I N G S

**THE CLERK:** All rise for the Honorable Court.

**THE COURT:** Good morning, everybody.

**VOICES:** Good morning, Your Honor.

**THE CLERK:** This is civil action No. 08-10066,  
McCullen, et al versus Coakley, et al.

Counsel please identify themselves for the record.

**MR. DePRIMO:** Your Honor, good morning. Michael  
DePrimo for the plaintiffs.

**MR. MORAN:** Good morning, Your Honor. May it  
please the Court, Philip Moran for the plaintiffs.

**THE COURT:** Good morning.

**MR. SALINGER:** And, good morning, for the  
defendants, Your Honor -- these are three of the plaintiffs,  
not counsel.

**THE COURT:** Okay.

**MR. SALINGER:** I am Ken Salinger and with me is.

**MS. VIATOR:** Gabrielle Viator.

**THE COURT:** Okay. Is that all the introductions?  
Sit down, please. Make yourselves comfortable.

**MR. DePRIMO:** Your Honor, I would also like to  
introduce the plaintiffs that are here.

**THE COURT:** Sure.

**MR. DePRIMO:** To Mr. Moran's right is Dr. Cyril  
Shea, one of the plaintiffs. To Dr. Shea's right is Mark

1 Bashour and to Mark's right is Eleanor McCullen.

2 **THE COURT:** Nice to see all of you here today.

3 **MS. McCULLEN:** Thank you.

4 **MR. DePRIMO:** We also have with us in the gallery  
5 Jean Zarrella and Nancy Clark. Jean is on the left and  
6 Nancy is on the right (indicating).

7 **THE COURT:** Also plaintiffs?

8 **MR. DePRIMO:** Also plaintiffs, Your Honor.

9 **THE COURT:** Happy to have you here.

10 **MR. DePRIMO:** Plaintiff Eric Cadin could not be  
11 here, he's out of state and plaintiff Greg Smith is  
12 recovering from heart surgery.

13 **THE COURT:** That is too bad, I am sorry. I hope he  
14 is able to get a true recovery.

15 **MR. DePRIMO:** He seems to be doing well but he  
16 couldn't be here today.

17 **THE COURT:** Good. Anything else? We are ready to  
18 get started?

19 **MR. DePRIMO:** Yes.

20 **THE COURT:** Why don't you sit down, make yourselves  
21 comfortable.

22 Now, I have been told that you I think intend to  
23 try to use a --

24 **MR. DePRIMO:** A PowerPoint presentation.

25 **THE COURT:** -- a PowerPoint presentation. Why do I

1 need that with this substantial record here?

2 **MR. DePRIMO:** I think, Your Honor, we have seven  
3 plaintiffs. We have three different locations. I think  
4 visuals would be very helpful to the Court.

5 **THE COURT:** Don't we have those visuals?

6 **MR. DePRIMO:** We have the visuals in the record. I  
7 thought that as I was explaining my case that it would be  
8 easier for the Court to understand if I could actually point  
9 things out --

10 **THE COURT:** You are talking about using it in your  
11 opening statement?

12 **MR. DePRIMO:** I am talking about using it  
13 throughout my case.

14 **THE COURT:** Is there any objection to the  
15 authenticity of the images that are going to show up on  
16 the -- I always forget the name. What is it?

17 **MR. DePRIMO:** PowerPoint.

18 **THE COURT:** PowerPoint.

19 **MR. SALINGER:** Your Honor, we haven't seen what is  
20 in the presentation; but use of the material that we've  
21 already stipulated to as being in the evidentiary record, of  
22 course we've got no objection to those being --

23 **THE COURT:** You are representing to me there is  
24 nothing that you are going to try to show me that isn't in  
25 the record; is that right?

1           **MR. DePRIMO:** Yes, not only will I represent that,  
2 Your Honor, but what I'm actually going to have is citations  
3 to the record on the screen.

4           **THE COURT:** Okay. Against my better judgment I am  
5 going to let you do it.

6           **MR. DePRIMO:** Thank you.

7           **THE COURT:** But I may cut you short if I think that  
8 we are eating up too much time, okay.

9           Are you going to make an opening statement?

10          **MR. DePRIMO:** Yes, Your Honor.

11          **THE COURT:** All right. Go ahead.

12          **MR. DePRIMO:** We are just going to get right to it.

13               I just want to apprise the Court that I will be  
14 supplying the Court with a copy of the PowerPoint  
15 presentation on a disk. I will also provide a copy of it to  
16 opposing counsel for later reference, if you want to look at  
17 the citations.

18          **THE COURT:** All right. Thank you.

19               Are you all set to make your opening now?

20          **MR. DePRIMO:** Your Honor, I'm prepared to go right  
21 into it.

22          **THE COURT:** When you say "right into it," you mean  
23 the opening or the case?

24          **MR. DePRIMO:** I'm going right into my PowerPoint  
25 presentation.

1           **THE COURT:** Okay. Go ahead.

2           You don't want to make an opening statement?

3           **MR. SALINGER:** Your Honor, if I might just clarify,  
4 since you're asking about opening statements, it's our  
5 understanding that essentially what we're doing today is  
6 each side is providing closing argument. We've agreed to  
7 what's in the record.

8           **THE COURT:** I suppose that makes more sense to  
9 classify it that way. I understand what you are saying.

10          **MR. SALINGER:** Okay.

11          **THE COURT:** So what your presentation will be is  
12 your summation as to what you think the significance of the  
13 evidence has been.

14          **MR. SALINGER:** Exactly, Your Honor.

15          **THE COURT:** Okay.

16          **MR. SALINGER:** Consistent with the requested  
17 findings that we filed about a week and a half ago.

18          **THE COURT:** Now, I am going to, on that subject, I  
19 am going to, after this is concluded, I am going to ask you  
20 to give me proposed findings of fact reference to the record  
21 with specificity. John Jones lives in Malden, record page  
22 three, line two. That is the kind of proposed findings of  
23 fact that I want. And I want them after, I want them  
24 submitted after the case closes so that it is clear that we  
25 are talking about a record that has been established, okay?

1           **MR. SALINGER:** And, Your Honor, just so the Court  
2 knows, the defendants filed that sort of requested findings  
3 on August 15th with specific citation by document number --

4           **THE COURT:** You know what I want. If you are  
5 satisfied that what you are giving me meets my expectations,  
6 then you can rely on that but that is what I want.

7           **MR. SALINGER:** Yes, Your Honor.

8           **THE COURT:** Okay. Are you ready to go?

9           **MR. DePRIMO:** Yes, Your Honor, thank you. Do you  
10 have a screen? Are you able to --

11           **THE COURT:** I do.

12           **MR. DePRIMO:** Okay.

13           **THE COURT:** What about Meg, doesn't she have one?  
14 (Whereupon, the Court and the Law Clerk conferred.)

15           **THE COURT:** Brand-new, brilliant law clerk,  
16 brilliant.

17           Go ahead.

18           **MR. DePRIMO:** Your Honor, a little bit of  
19 procedural background. This lawsuit was filed in January  
20 2008. The lawsuit challenges the constitutionality of  
21 Massachusetts General Laws 266, Section 120E 1/2, referred  
22 to as "the buffer law." We challenged both on its face and  
23 as applied.

24           In August 2008 this Court ruled that the buffer law  
25 is constitutional --



1           **THE COURT:** Before we go any further, I just want  
2 to say, I know that the spectators have a particular  
3 interest in this case. And I want everybody to know that I  
4 don't take regular recesses but if anybody wants to take a  
5 recess, including the interested parties here, just signal  
6 to me that you want a recess and we will all take a recess.  
7 It will probably be me taking a recess before you ask for it  
8 but I don't want anybody to be uncomfortable or miss any  
9 part of the presentation because of the need for a recess,  
10 okay. So just raise your hand and we will all take one.

11           All right. Now you go ahead.

12           **MR. DePRIMO:** Thank you, Your Honor.

13           To repeat what I just said, in 2008 this Court  
14 ruled that the buffer law is constitutional on its face. On  
15 appeal the First Circuit affirmed. The Supreme Court denied  
16 plaintiffs' request for review.

17           On remand this Court took up plaintiffs' as applied  
18 challenge. The Court granted the government's motion for  
19 partial judgment on the pleadings and dismissed all but one  
20 aspect of plaintiffs' time, place and manner as applied  
21 challenge.

22           Trial will consider a single issue:

23           Whether the law as applied gives plaintiffs ample  
24 alternative avenues of communication at three Planned  
25 Parenthood facilities: Boston, Worcester and Springfield.

1           The standard of review on a facial challenge, on  
2 facial challenge considers words on paper. An as applied  
3 challenge considers the practical realities of life and how  
4 they impact a speaker's ability to convey her message at a  
5 particular time and a particular place.

6           A facial challenge to a law requires no record or  
7 factual findings. In contrast, an as applied challenge is  
8 specific to the facts of the particular individuals involved  
9 in the suit. Neither this Court nor the First Circuit made  
10 any findings of fact with respect to the plaintiffs'  
11 activity at the three challenged locations.

12           In its decision upholding this Court's order on  
13 plaintiffs' facial challenge, the First Circuit noted the  
14 limitation of its ruling, and I'm quoting McCullen v.  
15 Coakley, 571 F.3d at page 180.

16           "It bears repeating at this point that we are  
17 dealing exclusively with a facial challenge to the 2007 Act.  
18 Thus, as long as we can envision circumstances in which a  
19 35-foot buffer zone allows adequate alternative means of  
20 expression, the challenge must fail."

21           At the end of its opinion the First Circuit made  
22 clear that the as applied challenge is to be considered on a  
23 clean slate. Again, quoting the First Circuit in McCullen,  
24 "We add a caveat...Nothing that we have said forecloses the  
25 possibility that, on a better-developed record, this

1 legislative solution may prove problematic in particular  
2 applications."

3 The buffer law itself permits the placement of a  
4 buffer zone, and I'm quoting, "within a radius of 35 feet of  
5 any portion of an entrance to, exit from, or driveway of a  
6 reproductive health care facility" so long as it is "clearly  
7 marked and posted."

8 Any person may enter and pass through the zone  
9 solely for the purpose of reaching a destination other than  
10 the abortion facility. The length of the buffer zones in  
11 this case range from 56 feet in front of the Planned  
12 Parenthood in Boston to 100 feet, 5 inches at the driveway  
13 entrance in front of Planned Parenthood in Springfield.

14 Plaintiffs begin with several fundamental First  
15 Amendment precepts. First, "Wherever the title of streets  
16 and parks may rest, they have immemorially been held in  
17 trust for the use of the public." Frisby v. Schultz.

18 Second, "Time out of mind, public streets and  
19 sidewalks have been used for public assembly and debate, the  
20 hallmarks of a traditional public forum." Frisby, 487 U.S.  
21 at 480.

22 Third, streets and sidewalks "are natural and  
23 proper places for the dissemination of information and  
24 opinion; and one is not to have the exercise of his liberty  
25 of expression in appropriate places abridged on the plea

1 that it may be exercised in some other place." Schneider v.  
2 State.

3 Fourth, "Leafletting, sign displays, and oral  
4 communications are protected by the First Amendment." Hill  
5 v.Colorado.

6 Fifth, "The right to free speech, of course,  
7 includes the right to attempt to persuade others to change  
8 their views."

9 The analytical process. Analyzing whether  
10 alternative avenues of communication are ample at particular  
11 places is guided by the following principles.

12 First, "When the government restricts speech, the  
13 government bears the burden of proving the constitutionality  
14 of its actions." United States v. Playboy Entertainment  
15 Group, 529 U.S. 803 at 816, 2000.

16 Quoting McCullen, "There is no particular buffer  
17 zone radius that is per se permissible or impermissible --  
18 everything depends on context."

19 "The government must consider the actual conditions  
20 speakers encounter when it restricts their speech." That's  
21 particularly important today, Your Honor, because we are  
22 talking about how this particular law is constitutional on  
23 its face operates in real life with real people at real  
24 locations.

25 "While the First Amendment does not guarantee the

1 right to employ every conceivable method of communication at  
2 all times and in all places, a restriction on expressive  
3 activity may be invalid if the remaining modes of  
4 communication are inadequate." Members of City Council of  
5 City of Los Angeles v. Taxpayers for Vincent, United States  
6 Supreme Court, 1984.

7 A valid time, place and manner regulation must  
8 "leave open ample alternative channels for communication of  
9 the information." McCullen. The key word there, Your  
10 Honor, is "ample," not merely adequate.

11 "The essence of this question is not whether a  
12 degree of curtailment of speech exists, but rather whether  
13 the remaining communicative avenues are adequate." D.H.L.  
14 Associates, First Circuit, 1999.

15 Where speech regulations "call into legitimate  
16 question the adequacy of the alternate route of  
17 communication," the regulations are unconstitutional.  
18 D.H.L. Associates.

19 "The simple fact that a speaker is permitted to  
20 communicate his message elsewhere does not end the analysis  
21 if the intended message is rendered useless or is seriously  
22 burdened." City of -- Weinberg v. City of Chicago. This is  
23 a Seventh Circuit case in 2002 quoting the United States  
24 Supreme Court City of Ladue versus Gilleo, 1994, also  
25 quoting Bay Area Peace Navy v. United States, a Ninth

1 Circuit case from 1990.

2 "The government must not substantially foreclose,  
3 as a practical matter, speakers' ability to communicate  
4 their message." The Hoye case, Your Honor, challenged the  
5 floating buffer zone ordinance that was adopted by the City  
6 of Oakland, California. The Ninth Circuit decided that case  
7 just last month. The court held that that ordinance was  
8 constitutional on its face but unconstitutional as applied.

9 An alternative is not adequate if it "forecloses a  
10 speaker's ability to reach one audience even if it allows  
11 the speaker to reach other groups." Gresham v. Peterson,  
12 Seventh Circuit, 2000.

13 It is true that the First Circuit has upheld,  
14 "Alternative means of communication despite diminution in  
15 the quantity of speech, a ban on a preferred method of  
16 communication, and a reduction in the potential audience."  
17 Sullivan v. City of Augusta, First Circuit, 2007.

18 It is also true that alternatives allowing the  
19 "more general dissemination of a message" are adequate where  
20 the message is not directed to a targeted audience but  
21 rather to the public at large. Sullivan, First Circuit.

22 For example, in Sullivan the First Circuit found  
23 adequate alternatives where the message sought to be  
24 conveyed emphasized "worldwide end of war and  
25 empire-building," and was directed to the public at large

1 rather than anyone in particular.

2 The plaintiffs in Sullivan sought to have a parade  
3 on the streets of the City of Augusta and they weren't  
4 looking to direct the message to anybody in particular but  
5 whoever was on the streets and sidewalk where they were  
6 marching.

7 Likewise, in Globe Newspaper v. Beacon Hill  
8 Architectural Commission, the First Circuit found  
9 alternatives adequate because street vendors could sell  
10 newspapers to the public at large in the very spot where  
11 banned news racks were not allowed.

12 Other circuits have held, and I'm quoting, "An  
13 alternative is not ample if the speaker is not permitted to  
14 reach the intended audience." That's a direct quote from  
15 the Ninth Circuit in Bay Area Peace Navy. That particular  
16 point of law has been adopted by the Sixth Circuit, the  
17 Third Circuit and the Seventh Circuit in the cases of Saieg  
18 v. City of Dearborn in the Seventh Circuit -- in the Sixth  
19 Circuit, Startzell v. City of Philadelphia in the Third  
20 Circuit, the Weinberg case in the Seventh Circuit.

21 These cases do not conflict with Sullivan because  
22 in each of those cases the speakers were directing  
23 particular messages to particular listeners at particular  
24 times and places.

25 At issue in Saieg was a regulation banning

1 leafletting on a public sidewalk outside a Muslim festival.  
2 The intended audience was Muslims whom the speaker sought to  
3 convert to Christianity.

4 The Sixth Circuit adopted the Ninth Circuit's test,  
5 i.e., "an alternative is not ample if the speaker is not  
6 permitted to reach the intended audience."

7 The court struck down the ban on leafletting  
8 because it was not a reasonable time, place and manner  
9 regulation.

10 And in all candor to the Court, the Sixth Circuit  
11 in this case actually struck it down because it was not  
12 narrowly tailored but they did set forth the standard for  
13 analyzing a time, place and manner regulation. And that  
14 standard was the one that was set forth by the Ninth  
15 Circuit.

16 At issue in Startzell was whether Christian  
17 activists proclaiming the sinfulness of homosexual conduct  
18 were unconstitutionally removed from certain public streets  
19 and sidewalks during a homosexual festival. Though the  
20 intended audience was homosexual persons, the Third Circuit  
21 found no constitutional violation because plaintiffs'  
22 disruptive conduct, derogatory comments and blocking of  
23 vendors justified the police action.

24 But unlike Startzell there is no evidence in this  
25 case of any disruptive conduct, any derogatory comments or



1 any type of physical obstruction or trespass.

2 In Weinberg the issue was the constitutionality of  
3 an ordinance prohibiting the sale of merchandise within  
4 1,000 feet of the United Center in Chicago. Weinberg sought  
5 to sell a book critical of Bill Wirtz, the owner of the  
6 Chicago Blackhawks. The Blackhawks played their home games  
7 at United Center. The Seventh Circuit found that Weinberg's  
8 intended audience was Blackhawks fans, and quoting, "The  
9 most opportune time and place to reach this audience is  
10 outside the United Center before and after Blackhawks home  
11 games."

12 Stating, "We cannot check common sense at the  
13 door," the Seventh Circuit found that, "United Center is a  
14 unique location for the sale of Weinberg's book." Finding,  
15 "Substantially detrimental effects on Mr. Weinberg's free  
16 speech rights," the Seventh Circuit concluded that, "The  
17 ordinance does not provide ample alternatives." And the  
18 court struck down that ordinance in Weinberg.

19 In Bay Area Peace Navy, at issue was a 75-yard  
20 security zone imposed by the Coast Guard during Fleet Week.  
21 The Peace Navy was an anti-war group that sought to protest  
22 to Navy officials. The Ninth Circuit found that the 75-yard  
23 barrier insulated the intended audience from the Peace  
24 Navy's message, thereby rendering Peace Navy's communication  
25 ineffective.

1           The Ninth Circuit concluded its analysis by saying,  
2       "The government simply has not met its burden of showing  
3       that there are sufficient alternative means of communicating  
4       the Peace Navy's message."

5           Finally, in Phelps-Roper the issue was the  
6       constitutionality of a Missouri statute that regulated  
7       picketing near funerals. The statute criminalized picketing  
8       within 300 feet of a funeral location or procession. The  
9       Eighth Circuit found that people -- I'm quoting the Eighth  
10      Circuit -- who "protest or picket at or near a military  
11      funeral wish to reach an audience that can only be addressed  
12      at such location (sic)."

13           **THE COURT:** "Occasion."

14           **MR. DePRIMO:** "At such occasion."

15           The Eighth Circuit concluded that the anti-funeral  
16      picketing statute "fails to afford open, ample and adequate  
17      alternative channels for the dissemination of the speaker's  
18      particular message."

19           These cases teach that "alternatives are not ample  
20      where a speaker's ability to communicate effectively is  
21      threatened." That's Weinberg quoting United States Supreme  
22      Court in Taxpayers for Vincent.

23           The Third, Sixth, Seventh, Eighth and Ninth Circuit  
24      Courts of Appeal have concluded that alternative, that an  
25      alternative is not ample where the speaker cannot reach a

1 particular audience with a particular message at a  
2 particular time and place. The decisions of these circuits  
3 are consistent with the Supreme Court's decision in City of  
4 Ladue v. Gilleo where the court noted the importance of  
5 reaching an intended audience.

6 In striking down a ban on residential signs, the  
7 Court said, "The audience intended to be reached by a  
8 residential sign -- neighbors -- could not be reached nearly  
9 as well by other means."

10 Likewise, in Hill v. Colorado, the Supreme Court  
11 emphasized that, "The First Amendment protects the right of  
12 every citizen to reach the minds of willing listeners and to  
13 do so there must be an opportunity to win their attention."

14 Plaintiffs will show that the challenged buffer  
15 zones substantially foreclose their ability to effectively  
16 convey their abortion message to women seeking abortion at  
17 the time and place the abortion is about to occur.

18 Importantly, "Whether an alternative is ample should be  
19 considered from the speaker's point of view," not the  
20 government's. Quoting the Seventh Circuit in the Weinberg  
21 case.

22 The United States Supreme Court said, "The First  
23 Amendment mandates that courts presume that speakers, not  
24 the government, know best both what they want to say and how  
25 to say it."

1 Evidence showing that plaintiffs are able to  
2 disseminate their message to the public at large will not  
3 suffice to prove ample alternative avenues of communication.

4 Now I'll be presenting the facts.

5 The government offers two witnesses, Michael  
6 Baniukiewicz and Kristen Metzger. Mr. Baniukiewicz is the  
7 owner of Metro Crime Prevention. He has provided security  
8 for Planned Parenthood in Boston, Springfield and Worcester  
9 since 1996. Prior to starting his own security firm  
10 Mr. Baniukiewicz was a police officer for 15 years.

11 Ms. Metzger works for the Office of Attorney  
12 General as an investigator.

13 Neither Mr. Baniukiewicz nor Ms. Metzger know any  
14 of the plaintiffs. They cannot identify any of the  
15 plaintiffs either. In sum, neither of the government's  
16 witnesses know anything about the activities of the  
17 plaintiffs in this case. Consequently, the government has  
18 offered no witnesses that can rebut plaintiffs' testimony  
19 regarding plaintiffs' expressive activities and personal  
20 experiences.

21 With respect to plaintiffs' intended audiences at  
22 Planned Parenthood, certain facts are undisputed and  
23 compelling. This is how the government's own witness  
24 describes some of them:

25 "Having an abortion is one of the most important

1 decisions a woman can make in her whole life."

2 Mr. Baniukiewicz.

3 Persons contemplating abortion are "making a  
4 decision that will affect them literally until the day they  
5 die." Mr. Baniukiewicz.

6 Persons going into Planned Parenthood are "probably  
7 at the most vulnerable point in their life."

8 Mr. Baniukiewicz.

9 Women contemplating abortion "have the right to  
10 make an informed choice." Mr. Baniukiewicz.

11 "Some women may be pressured into abortion by  
12 boyfriends or husbands." Mr. Baniukiewicz.

13 Some women seeking abortion "suffer from economic  
14 hardship." Mr. Baniukiewicz.

15 No pro-life literature is allowed inside Planned  
16 Parenthood. It is confiscated by security officers before  
17 patrons enter the abortion facility. Mr. Baniukiewicz, the  
18 security chief of Planned Parenthood.

19 Planned Parenthood does not make available pro-life  
20 literature to clinic patrons. And that, of course, doesn't  
21 surprise any of us.

22 We now turn to plaintiffs and their activities at  
23 the challenged locations. First, Your Honor, plaintiffs  
24 rely on the entire stipulated factual record as evidence of  
25 their activities and experiences but will highlight only

1 some of the salient facts in this presentation.

2 Much of the testimony presented as to one plaintiff  
3 applies with equal force to others but will not be repeated  
4 for the sake of time and simplicity.

5 We'll first take a look at Planned Parenthood in  
6 Boston.

7 Eleanor McCullen is a 74-year old mother and  
8 grandmother. Eleanor seeks to persuade men and women not to  
9 abort the babies, abort babies through personal counseling  
10 and literature distribution. Eleanor seeks to engage people  
11 in close personal communication, in a normal conversational  
12 tone, with a kind, gentle voice, and with eye contact. This  
13 method of oral communication is essential to conveying an  
14 effective message.

15 In her experience a smile and eye contact put  
16 people at ease. The physical layout of the buffer zone  
17 often makes close communication impossible.

18 This (indicating), Your Honor, is a street view  
19 from a Google map of Planned Parenthood in Boston. The  
20 building that's in the center of the photograph is Planned  
21 Parenthood. To the left of the building, the Planned  
22 Parenthood building, is Alcorn Street. To the right of the  
23 building is an alleyway. The Court can see the vehicles  
24 parked on that alley.

25 If you look closely, Your Honor, you can see a

1 portion of the western portion of the buffer zone -- this  
2 photograph is actually looking northerly. The west is to  
3 the left. You can see a portion of the buffer zone on the  
4 street.

5 **THE COURT:** When you talk about "left," are you  
6 talking about my left or the --

7 **MR. DePRIMO:** I'm talking about the left of the  
8 photograph.

9 **THE COURT:** You determine left from where, what --

10 **MR. DePRIMO:** If we're looking directly at the  
11 photograph --

12 **THE COURT:** My left.

13 **MR. DePRIMO:** -- you should see Star Market to your  
14 left.

15 **THE COURT:** That is my left.

16 **MR. DePRIMO:** Yes, your left.

17 **THE COURT:** I just want to make sure it is clear.

18 **MR. DePRIMO:** Yes. To your left is Star Market.  
19 And in between Star Market and Planned Parenthood is Alcorn  
20 Street. And you can see it a little bit here, we'll look at  
21 it more closely in another photograph, but you can see the  
22 yellow buffer zone that goes into Alcorn Street. You can  
23 also clearly see that there are train or trolley tracks  
24 right in front of the Planned Parenthood facility.

25 The buffer zone in front of the Planned Parenthood

1 measures 56 feet from edge to edge. The reason it is not 70  
2 feet, Your Honor, is because it's actually an open foyer.  
3 It's a little bit difficult to see in this photograph but  
4 the door that we're looking at is actually recessed about 12  
5 feet from the front edge of the building so the buffer zone  
6 actually from edge to edge on the public sidewalk is 56 feet  
7 running along Commonwealth Avenue.

8 The distance from the east edge of the foyer to the  
9 east edge of the buffer line is 22 feet. As we look at the  
10 photograph, we're looking north, so east is to your right.

11 The distance from the west edge of the foyer to the  
12 west edge of the buffer line is 26.1 inch, 26.1 inch. West  
13 is to the left in the photograph. We actually can't see the  
14 edge of the buffer zone in this photograph because it's off  
15 to the left side of the page.

16 The top of the buffer zone extends one foot from  
17 the curb. As Your Honor may recall, there are actually two  
18 buffer zones in the buffer law. The one that is being  
19 challenged is the one that creates a zone within a 35-foot  
20 radius of entrances, exits and driveways.

21 There is a second buffer zone that has not been  
22 challenged and that creates a rectangular buffer from the  
23 doorway entrance straight out to the street.

24 You can see, Your Honor, barely a white line that  
25 kind of runs in the center of the photograph. That would be



1 that second buffer zone.

2           Essentially the second buffer zone is subsumed by  
3 the first one. But what I wanted to point out, Your Honor,  
4 is that even though the top of the buffer zone with respect  
5 to the 35-foot radius leaves one foot at the top of the  
6 zone, that second horizontal or rectangular zone actually  
7 goes right to the curb. Again, that zone has not been  
8 challenged -- the rectangular zone has not been challenged  
9 in this lawsuit.

10           The door to the clinic would be where the arrow is  
11 at the bottom of the photograph. You cannot see it but it  
12 would be toward the bottom.

13           This (indicating) is a photograph of the western  
14 side of the buffer. It goes into Alcorn Street 4.4 inches  
15 from the curb. We're actually looking down at Alcorn  
16 Street. We're, again, we're looking north.

17           Your Honor, the arc also extends down Alcorn  
18 Street. The buffer zone actually goes around the corner and  
19 extends 12 feet down from the edge of the building. So if  
20 somebody is walking up Alcorn Street south toward  
21 Commonwealth Avenue and they're walking on the sidewalk  
22 adjacent to the Planned Parenthood building, they will enter  
23 into that zone before they turn the corner to go left into  
24 Planned Parenthood.

25           This (indicating) is an example of the old versus

1 the new buffer line. The yellow line which you can see in  
2 the middle or white line that you can see toward the middle  
3 of the page right next to the building is the old 18-foot  
4 buffer line. The yellow line that's more toward the bottom  
5 of the page is the current 35-foot buffer line.

6 Your Honor, over the past five years Eleanor  
7 McCullen and her husband have spent over \$50,000 of their  
8 own money to pay for whatever was needed by a woman who  
9 chose to give birth rather than to abort her baby. The  
10 needs Eleanor provided for included baby showers, housing,  
11 furniture, household items, heating oil, electricity, water,  
12 telephone, gasoline, clothing, food, baby formula, diapers,  
13 and strollers. And I'm sure there is many, many more items  
14 as well.

15 Eleanor cannot make women aware of the financial  
16 help she can provide without close personal contact and an  
17 opportunity for confidential discussion. There are times  
18 when a woman is walking on Commonwealth Avenue and  
19 approaches the clinic from the side of the zone opposite  
20 where Eleanor is standing. Often Eleanor cannot get around  
21 the zone in time to begin a conversation with the woman or  
22 to place literature near the woman's hands.

23 There are also times when Eleanor is unable to  
24 reach persons who walk up Alcorn Street and enter the front  
25 door of the clinic because she is at the eastern edge, "she"

1 being Eleanor is at the eastern edge of the buffer zone.

2 This (indicating) is a photograph with an example  
3 of where Eleanor might be standing if she was on the eastern  
4 edge of the buffer zone and where a patron may be coming  
5 from if they were walking up Alcorn Street. By the time  
6 that patron turns the corner, Your Honor, the patron is  
7 inside the zone. There was no way that Eleanor would have  
8 any opportunity to go up to that person and talk to that  
9 person.

10 In some cases this means Eleanor is completely  
11 unable to convey her message to her intended audience. In  
12 other instances it means Eleanor's message must be delivered  
13 faster, louder and with different content than normal.  
14 This, too, sometimes renders attempts to communicate  
15 ineffective.

16 The need for Eleanor to raise her voice is often  
17 increased not only by the distance but by traffic and other  
18 ambient noise. The ambient noise makes it difficult for  
19 people to hear Eleanor and for Eleanor to hear them.

20 Standing outside the buffer zone makes it harder  
21 for Eleanor to discern who is heading for Planned Parenthood  
22 as compared to just walking along on the sidewalk. Planned  
23 Parenthood is located on a very busy street, Commonwealth  
24 Avenue. My understanding is Boston University is in that  
25 vicinity. You have got all kinds of people walking up and

1 down, they're going east, they're going west.

2 Mrs. McCullen, Eleanor, has a very short time to be able to  
3 try to discern whether somebody who is walking up the street  
4 is maybe just walking to the university, walking to the  
5 grocery store, going home or heading to the clinic.

6 When Eleanor, before the zone, Your Honor, Eleanor  
7 stood right in front of that door so Eleanor would know when  
8 somebody was going into Planned Parenthood because they  
9 would actually be walking into the door.

10 Because the west side of the zone extends into  
11 Alcorn Street, Eleanor sometimes must choose between  
12 standing in the street or shouting from across Alcorn  
13 Street. This particular photograph (indicating) is a view  
14 of a sidewalk on Planned Parenthood from the sidewalk  
15 opposite Planned Parenthood across from Alcorn Street. The  
16 viewpoint, Your Honor, is probably close to being in front  
17 of Star Market. We're actually looking eastward towards  
18 downtown Boston in this photograph.

19 On two occasions cars turning from Commonwealth  
20 Avenue onto Alcorn Street brushed against Eleanor while she  
21 was standing at the edge of the buffer zone.

22 This (indicating) is a photograph provided by the  
23 government that shows three people simply talking, standing  
24 at the edge of the buffer zone. Cars that are pulling off  
25 of Commonwealth Avenue to make a right-hand into Alcorn

1 Street, these folks are right in the path of their vehicle.

2 This next photograph shows that directly. This is  
3 another photograph that was provided by the government. We  
4 see a vehicle on the left side of the photograph. It's  
5 pulling off of Commonwealth Avenue going down into Alcorn  
6 Street. And anybody who is standing at the edge of that  
7 buffer zone is in the direct path of that moving vehicle.

8 Both government witnesses testified it's unsafe to  
9 stand at the edge of the buffer line on Alcorn Street  
10 because it's in the path of moving vehicles.

11 Now, Eleanor distributes literature about abortion  
12 and abortion alternatives in both English and Spanish. This  
13 (indicating) is one of the Eleanor's handouts. The first  
14 page here, Your Honor, shows the first day of human  
15 gestation. The second panel shows the first month. The  
16 second panel shows the second month. The third panel shows  
17 the third month, the fourth panel the fourth month -- I'm  
18 sorry -- the fifth panel, the fourth month and the sixth  
19 panel the fifth month.

20 As Your Honor can see, this is very detailed  
21 information. It's not the kind of information that one can  
22 put up on a sign. It's not even the type of information  
23 that one could share orderly unless one might have a half an  
24 hour to do so. You certainly can't share this type of  
25 detailed information within 30 seconds or one minute.

1           This (indicating) is another handout that Eleanor  
2       tries to provide to women going into Planned Parenthood.  
3       That is a brochure from *A Woman's Concern*. It's a crisis  
4       center. There is contact information on the back panel.  
5       You can see that on the left side of the photograph. I've  
6       got an arrow pointing to that. Again, something that's not  
7       appropriate for a sign, something very, very difficult to  
8       convey to someone orally if you have only seconds to do so.

9           A third handout (indicating) from Eleanor, again,  
10      *The Diary Of An Unborn Child*, three months from the date  
11      that the child was conceived up to the day in December in  
12      the third month when she was aborted or he was aborted.

13           This is very detailed information, Your Honor.  
14      It's not the kind of information that one could put on a  
15      sign; and, again, it's not the kind of information one can  
16      convey orally if one has just seconds to do so.

17           This (indicating) I believe is the, this may be the  
18      second page of that previous one or it may be another one  
19      but, again, highly detailed information. The text is very,  
20      very small, not something that can be put up on a sign.  
21      Significant events in a new life.

22           It may very well be, Your Honor, that a young  
23      woman, 16, 18, 20 years old, may not really understand the  
24      gestational issues of a baby, the periods of, gestational  
25      periods of a baby. This type of information is informative,

1 it's factual, it's something that these, many of these folks  
2 really need to know, especially if they don't know it.

3 This (indicating), Your Honor, is another piece of  
4 literature that Eleanor attempts to hand out. It's a copy  
5 of the text of the rosary, at least one decade of the  
6 rosary. This, Your Honor, is a copy or a photograph of  
7 rosary beads. Eleanor oftentimes when she's able will hand  
8 out a package that contains these rosary beads with other  
9 information. That's not something one can put on a slide.  
10 That's not something one can convey orally. The only way  
11 that Eleanor can get this to a person is if she can put it  
12 in the person's hands. And in many instances she's just too  
13 far away to be able to reach somebody.

14 Eleanor also gives out a card with her home  
15 telephone number on it in case a woman later needs  
16 assistance, regardless of whether or not that woman had an  
17 abortion. Here (indicating) is a copy of the card that  
18 Eleanor hands out. It's got her home phone number on it.  
19 It's got a website that somebody could access if they want  
20 further information.

21 Eleanor has handed out thousands, thousands of  
22 these cards. Many of them, obviously, Your Honor, before  
23 the buffer zone law took effect.

24 Eleanor frequently receives telephone calls at home  
25 from women who want additional help or information. In many

1 instances, the buffer zone makes it impossible for Eleanor  
2 to place literature near the hands of her intended audience.

3 Rarely do men and women go to Eleanor when she  
4 beckons them from outside the zone. Once those, once folks  
5 are inside the zone headed to the door of Planned  
6 Parenthood, Your Honor, they just don't leave the zone and  
7 go out to the pro-life advocates even if they urge them in  
8 getting them to come out.

9 Eleanor does not hold a sign at the clinic because  
10 it is too impersonal. For the same reason Eleanor does not  
11 use a sound amplification device. Over the years, hundreds  
12 of women have accepted Eleanor's offers of help. Many have  
13 given birth to their child instead of aborting.

14 Since the buffer law took effect there are, on  
15 average, five to six people each day, or 480 to 586 people  
16 per year that Eleanor is unable to reach. These are 586  
17 people in front of Planned Parenthood who are seeking the  
18 services of Planned Parenthood, many of whom likely are  
19 seeking an abortion.

20 Eleanor reaches far fewer people under the new  
21 buffer law than under the previous law. For Eleanor, close  
22 personal contact is essential for her to convey a message of  
23 love, hope --

24 **THE COURT:** How do you know how many, how do those  
25 figures -- what is the source of those figures?



1           **MR. DePRIMO:** The source of those figures are  
2 Eleanor's testimony in her deposition.

3           Eleanor testified that on average there are five to  
4 six people a day that she cannot reach. These people --

5           **THE COURT:** There is no independent tracking of  
6 that figure?

7           **MR. DePRIMO:** There is no independent tracking,  
8 Your Honor, but neither is there any disputed evidence in  
9 the record.

10          **THE COURT:** No, I understand.

11          **MR. DePRIMO:** The government doesn't dispute it.

12          **THE COURT:** I understand. I just wanted to make  
13 sure I understand.

14          **MR. DePRIMO:** That's correct, Your Honor.

15          **THE COURT:** Thank you.

16          **MR. DePRIMO:** Your Honor, the next plaintiff we'll  
17 discuss is Jean Blackburn Zarrella. Jean also goes to  
18 Planned Parenthood in Boston. She's 85 years old, she's a  
19 mother and a grandmother.

20               As a direct result of the information and  
21 counseling Jean has provided, at least 100 women who went to  
22 abortion clinics with the intent to abort left without going  
23 inside or went in and then came out shortly thereafter.

24               Since the current buffer law took effect, Jean is  
25 not aware of even a single woman, not a single woman who

1 chose birth over abortion as a result of Jean's counseling  
2 efforts.

3 Jean attempts to persuade men and women not to  
4 abort by helping them make an informed decision. Jean  
5 offers practical help and educational material as well as  
6 referral information.

7 This (indicating) is one of the pieces of  
8 literature that Jean hands out. It is a very, very small  
9 pamphlet. This is an accurate size, it may be off slightly  
10 but it's small, it's thin. It's called *Fetal Facts*. It  
11 talks about the specifics of a baby, the gestational  
12 process. You can see that on the left-hand side, in the  
13 left photograph.

14 On the right photograph it talks about abortion  
15 alternatives at the top. Toward, about a third of the way  
16 down there are phone numbers that people can call any time  
17 if they want information or further counseling. Again, this  
18 is not the kind of information that can be provided orally  
19 or through a sign.

20 Not only that, Your Honor, if the information is  
21 provided orally or through a sign, somebody doesn't have it  
22 for future reference. If somebody takes a pamphlet, puts it  
23 in their pocket, puts it in their purse, later that evening,  
24 next week, next month they can pull it out, refer to it,  
25 make a phone call if they are of a mind to do that.

1           This (indicating), Your Honor, is another piece of  
2 literature that Jean hands out. This is actually the size  
3 of a business card. I have blown it up so you can see it a  
4 little bit better. There is an imprint of a tiny hand on  
5 the left and it's a real practical reminder to women  
6 contemplating abortion as to what a baby actually looks like  
7 in the very early stages of human gestation.

8           On the right side, again, it shows what the hand  
9 looks like at eight weeks. It shows what the hand looks  
10 like at twelve weeks. It describes the hands before birth.

11           No one can see that card, Your Honor, if Jean were  
12 to kind of wave it at people, it's just too small. It's the  
13 size of a business card.

14           Jean also hands out a card that is a little bit  
15 larger of a weeping Virgin Mary. There is an address and a  
16 telephone number on the back of that card. There is a  
17 prayer on that card that someone might refer to. If there  
18 is a religious person who is seeking an abortion, this may  
19 be something that is very comforting to them. It's not  
20 something that one could put on a card. It's not something  
21 that one can express orally within just a few seconds, which  
22 is often all the time that the plaintiffs have before people  
23 walk through the zone and get into the clinic.

24           Another businesslike card that Jean hands out is a  
25 card that welcomes Catholics who may have strayed from the

1 church to come home. The card has a web address on it.  
2 Again, for future reference if the card holder seeks further  
3 information.

4 In Jean's experience counseling is effective when  
5 offered in a friendly and gentle manner from a normal  
6 conversational distance of no more than six to eight feet.  
7 Jean finds it necessary to stand near the path of  
8 pedestrians because, unless her proffer of literature is  
9 placed near their hands, most passersby won't make the  
10 effort to take it.

11 Jean's experience is confirmed by Ms. Metzger, the  
12 investigator for the Attorney General, who said she is more  
13 likely to reach out and take a piece of literature from  
14 someone placing it near her hands as she walked by as  
15 compared to someone who is waving it from 35 feet away.

16 Jean's experience is also confirmed by  
17 Mr. Baniukiewicz who said when people pass close by pro-life  
18 advocates, they take literature that is handed to them.  
19 That's not the case when pro-life advocates are 10, 20, 30,  
20 50 feet away.

21 Since the buffer law took effect, there have been  
22 hundreds of occasions when clinic patrons entered the marked  
23 zone at the clinic from the side opposite of where Jean was  
24 standing. For example, in the photograph Jean may have been  
25 at the end of the buffer line on Alcorn Street. The patron

1 may have been coming from the opposite direction. She may  
2 have been walking west, westerly, sort of coming from the  
3 downtown Boston area. If Jean, who is 85 years old, tries  
4 to walk through that buffer -- and, by the way, Your Honor,  
5 it's clear in the record that no abortion speech can take  
6 place inside that buffer or it's a criminal offense that can  
7 land somebody in jail for three months. Jean oftentimes  
8 can't transgress that 56 feet before the woman walking  
9 toward her actually gets into the zone.

10 And once Jean gets to the opposite side where she  
11 can speak, the woman is gone, oftentimes inside the door.  
12 As a result, Jean is often unable to reach her intended  
13 audience.

14 Because of the buffer law, the closest Jean can get  
15 to the entrance of Planned Parenthood is to stand at the  
16 edge of the buffer line on Alcorn Street with her back  
17 toward traffic. Because the effectiveness of Jean's message  
18 depends on close personal contact, she needs to stand as  
19 close to people entering Planned Parenthood as she can.

20 Standing on the sidewalk opposite the buffer line  
21 is unsatisfactory because it adds an additional 21 feet, 9  
22 inches to the already 26-foot distance from the buffer line  
23 to the open foyer of Planned Parenthood. So if she is  
24 standing on the corner opposite on the sidewalk, opposite  
25 the buffer line, she is actually almost 48 feet from the

1 open foyer. And this (indicating) is a photograph of that.

2 If, for example, Jean were to stand right at the  
3 edge where the arrow is pointing, she would be about 48 feet  
4 from the open foyer.

5 That's not all, Your Honor, because the door to  
6 Planned Parenthood is set back 12 feet from the public  
7 sidewalk. So if Jean is standing on the sidewalk opposite  
8 Planned Parenthood, opposite Alcorn Street where the buffer  
9 zone is, she is nearly 60 feet away from the door.

10 In Madsen the buffer zone that was upheld via an  
11 injunction was 36 feet. This buffer zone or buffer at least  
12 is nearly 60 feet.

13 And this (indicating) is a photograph with an arrow  
14 as to how that's calculated. If I'm standing in front of  
15 the Star Market at the very edge of the curb, to the door  
16 that's recessed 12 feet from the edge of the building it's  
17 59 feet, 9 inches.

18 This means the 35-foot buffer as set forth in the  
19 buffer law morphs into a 60-foot buffer when it's applied in  
20 real life.

21 Every Saturday, Your Honor, Jean observes Planned  
22 Parenthood escorts on the public ways adjacent to the  
23 clinic. It is of no consequence that the escorts are not  
24 agents of the state or controlled by it.

25 As the Ninth Circuit noted in the Hoye case last

1 month, "As to the relevance of efforts by the escorts to  
2 prevent Hoyer's message from being communicated, the factual  
3 predicate of an as applied challenge does not need to be  
4 created by the state."

5 In the McGuire case, McGuire v. Reilly, the First  
6 Circuit held that escorts were not agents of the state and,  
7 therefore, the facial challenge would be upheld. But when  
8 we're talking about an as applied challenge, it is not  
9 necessary for the escorts to be agents of the state. All  
10 that's necessary is that the escorts interfere with the  
11 speaker's message. It's simply an additional fact that  
12 demonstrates why alternative avenues of communication are  
13 not ample.

14 The impact of escorts on speaker's ability to  
15 effectively convey their message is part of the ample  
16 alternatives as applied analysis. Again, citing Hoyer, Ninth  
17 Circuit last month.

18 Your Honor, this (indicating) is a photograph which  
19 was provided to us by the government. As the Court can see,  
20 at the end of the arrow toward the bottom of the page there  
21 is a Planned Parenthood escort. She's easily identified  
22 because she is wearing a blue vest.

23 In almost every instance where a person appears  
24 headed to Planned Parenthood, one or more escorts approach  
25 the person outside the center and then walk with the person

1 past the buffer line and up to the door of the clinic. As  
2 they walk along, the escorts talk with or even at the person  
3 so as to direct their attention away from Jean and to  
4 prevent them from listening to Jean's message.

5 Escorts surround, cluster, walk with, yell, make  
6 noise, chatter or talk loudly as they usher people to  
7 Planned Parenthood's front door.

8 Not only, this is not only Jean's experience, Your  
9 Honor, but Eric Cadin and Greg Smith also observed the same  
10 thing.

11 They say things like, "You don't have to listen to  
12 her," or "don't pay attention her," "don't listen to her,"  
13 or "she is crazy."

14 Escorts make it extremely difficult for Jean and  
15 Eric Cadin to win the attention of people approaching the  
16 clinic, especially when the escorts surround and talk at  
17 them.

18 The experiences of plaintiffs are corroborated by  
19 Planned Parenthood's security chief Michael Baniukiewicz.  
20 This is what he said:

21 "If a patient is outside the zone, and they are  
22 stopped outside the zone or someone is attempting to stop  
23 them outside of the zone, escorts will help lead them into  
24 the buffer zone where they could get into the clinic."

25 Mr. Baniukiewicz further testified that, If Planned



1 Parenthood escorts see pro-life people offering literature  
2 or rosary beads to patrons, they will go to the patrons and  
3 grab them by the arm and lead them into the buffer zone. He  
4 uses the term simply "lead them by the arm."

5 Next we'll talk about Eric Cadin. Mr. Cadin is a  
6 30-year old seminary student at St. John's Seminary in  
7 Boston. Formerly he was a pre-med student at Harvard. For  
8 the past six years Eric has provided information to persons  
9 entering or passing by Planned Parenthood in Boston.

10 His primary audience is persons seeking abortions.  
11 On several occasions women seeking abortions changed their  
12 minds as a result of the information and counseling that  
13 Eric provided.

14 It is extremely difficult for Eric to identify  
15 persons intending to enter the clinic from a distance of 35  
16 feet or more. As I mentioned earlier, Your Honor, that's a  
17 very busy area. People are walking back and forth, up and  
18 down Commonwealth Avenue. They can be going anywhere.

19 Oftentimes somebody can't identify them as going to  
20 Planned Parenthood until they've approached the door and  
21 make the right or left-hand turn and actually go inside.  
22 And once they do that, they're well inside the buffer zone.

23 Consequently, the zone makes it very difficult for  
24 Eric to identify and converse with his intended audience  
25 before they enter Planned Parenthood.

1           The effectiveness of Eric's message, his oral  
2           message, depends largely on whether he can communicate from  
3           a normal conversational distance. In his experience  
4           speaking in a raised voice, shouting or yelling is  
5           counterproductive.

6           Eric's message is different from most other  
7           pro-life counselors at the clinic because Eric is young and  
8           male and most others are middled-aged or elderly and female.  
9           Many people patronizing Planned Parenthood are in Eric's age  
10          group and, like Eric, are of limited financial means. For  
11          this reason Eric is able to empathize with their situation  
12          in a way different from someone who may be comfortably  
13          middle-aged or retired.

14          When at Planned Parenthood Eric wears his clerical  
15          collar so people will know that he brings a religious  
16          perspective to the conversation.

17          Eric relates especially well to young men who  
18          patronize the clinic, many of whom appear bewildered or  
19          scared.

20          Eric especially likes to speak with persons who  
21          earlier had accompanied women seeking abortion. He attempts  
22          to speak with them, he attempts to speak with them when they  
23          come out to the front of the clinic to smoke cigarettes,  
24          make phone calls, talk or just hang out. These people  
25          usually stand by or lean against the building toward Alcorn

1 Street within five to ten feet of the open foyer.

2 This (indicating) photograph, Your Honor, would  
3 depict approximately where the companions may be standing.  
4 Eric, if he's on the western side of the zone on Alcorn  
5 Street next to the buffer, is at least 26 feet -- pardon  
6 me -- I believe 20 feet away from those folks, 15 to 20 feet  
7 depending upon where they're actually leaning against the  
8 door or in the open foyer.

9 If Eric is standing on the eastern side of the  
10 buffer zone, these people are 35 to 40 feet away from him.  
11 Again, if he's on the east side as depicted in this  
12 photograph, it's about 40 feet or so between him and these  
13 companions.

14 The buffer zone makes it impossible for Eric to  
15 have a friendly conversation with these people from close  
16 range.

17 Greg Smith is 77 years old. He has five children  
18 and nine grandchildren. For the past 18 years he's gone to  
19 Planned Parenthood in Boston. He prays the rosary. He  
20 displays a Crucifix. He sings religious hymns. And he's  
21 done so nearly every Saturday for the past 18 years from  
22 about 8:00 a.m. until 9:30 a.m.

23 He prays out loud so escorts, patrons and passersby  
24 can hear his prayer.

25 Prior to the enactment of the buffer law, Greg's

1 customary routine when praying or displaying his Crucifix  
2 was to stand still on the public sidewalk directly in front  
3 of the clinic entrance about six feet from the curb. That  
4 area is now squarely inside the zone.

5 Greg wishes to pray and display his Crucifix inside  
6 the zone so escorts and patrons can better see and hear his  
7 message but the buffer law prevents him from doing so.

8 Your Honor, Eric or -- Greg is different from the  
9 other plaintiffs. Greg does not seek that close personal  
10 oral communication as does Jean and Eleanor and Eric.  
11 Nevertheless, Greg desires to be as close to that front door  
12 as he can so that the people can hear him and would have a  
13 close-up view of his Crucifix.

14 Next, Your Honor, I'm going to give the Court a  
15 real life example of the effectiveness of close personal  
16 communication.

17 This testimony comes from the government's own  
18 witness Kristen Metzger. On April 2, 2010 Ms. Metzger went  
19 to Planned Parenthood in Boston and when she was there she  
20 observed three pro-life counselors speaking with a young  
21 woman. The young woman was walking east on Commonwealth  
22 Avenue toward Planned Parenthood when she was approached by  
23 the counselors.

24 If the Court can envision looking at Planned  
25 Parenthood straight ahead in front of him, Star Market is to

1 the left. This woman would have been approaching from that  
2 side. She would have been walking in an easterly direction.

3 **THE COURT:** Toward downtown.

4 **MR. DePRIMO:** Toward downtown. She would not have  
5 reached Planned Parenthood yet.

6 She was approached before she reached the buffer  
7 line on Alcorn Street so she had not yet entered the buffer.

8 The three counselors speak to this young woman for  
9 30 minutes standing on the public sidewalk at the corner of  
10 Alcorn and Commonwealth Avenue. After they finished  
11 talking, the young woman and two of the counselors walked  
12 across Commonwealth Avenue to a parked car. They got in the  
13 car and they all left together.

14 Now, Your Honor, we don't know exactly where they  
15 went but the testimony in the record is is that counselors  
16 will oftentimes take women contemplating an abortion to a  
17 crisis pregnancy center. That may be where they went, we  
18 don't know.

19 During the conversation on the sidewalk, one of the  
20 counselors placed her hand on the young woman's shoulder.  
21 Ms. Metzger acknowledges placing a hand on the shoulder of  
22 someone is a gesture of comfort and empathy. The young  
23 woman wasn't offended by that gesture.

24 This young woman was responsive to the three  
25 pro-life counselors. She did not walk away, she listened

1 and she accepted literature. That's the testimony of the  
2 government's own witness.

3 The three women counselors spoke at close range and  
4 they made eye contact. They didn't use microphones and they  
5 didn't shout. They spoke at a normal conversational level.  
6 Although Ms. Metzger was standing on Alcorn Street, she did  
7 not hear the words being spoken. She could only hear the  
8 sound of voices.

9 This (indicating), Your Honor, is a photograph  
10 provided by the government of that particular incident. If  
11 the Court looks closely, the woman with the white hair in  
12 the brown coat has her right hand on the shoulder of the  
13 young woman. This is how the pro-life counselors  
14 effectively communicate with the women seeking the services  
15 of Planned Parenthood.

16 Reasons ample alternatives are lacking in Boston.

17 One, plaintiffs seek to persuade men and women to  
18 reconsider abortion just moments before an abortion is about  
19 to occur. In most instances plaintiffs have a single and  
20 short-lived opportunity to counsel men and women before the  
21 abortions take place. Once that opportunity is lost, it's  
22 gone forever. Once the abortion takes place, there is no  
23 more opportunity for counseling.

24 Life-changing matters are personal, Your Honor.  
25 They should not be -- they should be discussed face-to-face,

1 not from 20, 30, or 50 feet away.

2 An effective approach to persons seeking abortion  
3 requires a smile, eye contact, gentleness and a  
4 demonstration of genuine sincerity. Plaintiffs can achieve  
5 this only at close range.

6 Ambient noise sometimes makes it difficult to hear  
7 plaintiffs' voices even when those voices are raised.

8 The zone makes it impossible to place literature  
9 near the hands of passersby when plaintiffs are not near  
10 their path.

11 Most people will not make the effort to take  
12 offered literature unless it is placed near their hands.  
13 Even when successfully distributed, pro-life literature is  
14 confiscated and thrown away by Planned Parenthood security  
15 before the patrons even get into the clinic.

16 Standing at the edge of the zone on Alcorn Street  
17 puts plaintiffs in danger of grave bodily harm. And  
18 standing across Alcorn Street makes the buffer 60 feet, not  
19 35 feet.

20 Escorts interfere with plaintiffs' communication  
21 efforts by shielding patrons from plaintiffs' speech and  
22 walking with them all the way to the door. As a result of  
23 the zone, Eleanor cannot reach nearly 600 members of her  
24 intended audience each year. Over the past three years,  
25 three and a half years, that's over 2,000 people.

1 Since the zone's establishment --

2 **THE COURT:** Where do you get that information from?  
3 Her testimony?

4 **MR. DePRIMO:** Her testimony, Your Honor, and I'm  
5 simply multiplying 600 times three and a half years. 600,  
6 almost, nearly 600. I think she said the high end may be  
7 about 586. So times three and a half years is about 2,000,  
8 give or take.

9 Since the zone's establishment, Jean has not been  
10 able to persuade even a single woman to choose birth over  
11 abortion, not one.

12 Other methods of communication, Your Honor, are  
13 ineffective.

14 The counseling of a young woman on April 2, 2010  
15 was the only instance, the only instance in which  
16 Ms. Metzger ever saw a person respond to a pro-life message.

17 During her investigation Ms. Metzger saw people try  
18 to express a pro-life message through signs, prayers,  
19 shouting and distributing literature. But she never saw any  
20 response to these types of communication.

21 While observing people holding signs, Ms. Metzger  
22 could not tell whether they were nice, gentle, loving or  
23 hateful.

24 A person is more likely to be persuaded by a  
25 speaker who is smiling from a few feet away and talking at a



1 normal conversational level as compared to a speaker yelling  
2 from 35 feet away. This is Ms. Metzger's testimony. And,  
3 Your Honor, plaintiffs contend that her testimony is binding  
4 on the defendants because she is a representative of the  
5 Attorney General's Office and she's the one that the  
6 Attorney General selected to testify with respect to the  
7 facts in the as applied challenge.

8 Face-to-face conversation is always the best way to  
9 communicate with willing listeners. That's the testimony of  
10 government witness Mr. Baniukiewicz.

11 According to Ms. Metzger, a conversational distance  
12 is two to three feet.

13 Mr. Baniukiewicz never saw anyone inside the zone  
14 walk over to a pro-life person outside the zone. Not a  
15 single time.

16 Signs, Your Honor, are not a viable alternative.  
17 Ms. Metzger never observed anyone respond to a pro-life  
18 sign. Her testimony was they just walked on by.

19 Mr. Baniukiewicz, for example, testified that he  
20 doesn't even pay attention to pro-life signs.

21 Signs are not an adequate alternative for several  
22 other reasons.

23 One, a sign is impersonal. And it's vital that  
24 plaintiffs be able to communicate in a very personal way.

25 Two, a sign is normally viewed momentarily for no

1 more than a few seconds.

2 Three, a sign offers only one-way communication.

3 Four, space limits the amount of a sign's content.  
4 There is only so much you can put on a sign if you make it  
5 legible for people to read from 35 or 50 or 70 feet away.

6 Five, a sign cannot be referred to a later time, as  
7 can a piece of literature that may have a website or a phone  
8 number on it.

9 Six, a sign cannot convey the personal sincerity of  
10 the displayer.

11 It cannot substitute for personal warmth and  
12 caring.

13 And it certainly cannot substitute for personal  
14 knowledge, especially medical knowledge. And one of our  
15 plaintiffs, Your Honor, is a retired medical doctor.

16 Lastly, signs are no more than visual sound bites.  
17 We live, Your Honor, in a sound bite society and that's all  
18 a sign is.

19 Now, Your Honor, we will turn to Planned Parenthood  
20 in Worcester, unless the Court would like to ask me any  
21 questions about --

22 **THE COURT:** Do you want to cross-examine now, did  
23 you have any idea of doing something like that or are you  
24 going to present something --

25 **MR. SALINGER:** Why doesn't Mr. DePrimo finish and

1 then we will give our own closing argument, Your Honor --

2 **THE COURT:** All right.

3 **MR. SALINGER:** -- on all three of the claims.

4 **THE COURT:** Very good. We will handle it that way.

5 **MR. DePRIMO:** Your Honor, shall I continue?

6 **THE COURT:** Yes, please.

7 **MR. DePRIMO:** Okay. We are moving to Planned  
8 Parenthood in Worcester now.

9 Our two plaintiffs who go to Planned Parenthood in  
10 Worcester are Mark Bashour and Nancy Clark. Mark is 52  
11 years old. He has never been married and he has no  
12 children.

13 He's been going to the public ways adjacent to  
14 Planned Parenthood in Worcester for the past twenty years.

15 Now, Your Honor, Planned Parenthood is a particular  
16 location and it now exists at 470 Pleasant Street. It has  
17 only been there for about a year and a half. However, there  
18 has been a Planned Parenthood facility in Worcester for  
19 many, many years, simply at a different location.

20 Planned Parenthood in Worcester is located in a  
21 stand-alone building. The main door is located adjacent to  
22 the parking lot. The driveway entrance is located around  
23 the corner on Dewey Street.

24 There are two buffer zones. One is on Pleasant  
25 Street surrounding a concrete walkway and the other is on

1 Dewey Street at the driveway. This (indicating) is a  
2 photograph, Your Honor, actually it's a Google map of the  
3 area surrounding Planned Parenthood in Worcester. To the  
4 left toward the bottom of the photograph you'll see a white  
5 roof and you will see the words "Planned Parenthood."  
6 That's the building, the stand-alone building that Planned  
7 Parenthood is located in.

8 As we're looking left to right --

9 **THE COURT:** Now, is that sign actually on the roof  
10 or --

11 **MR. DePRIMO:** No, it is not, Your Honor. All the  
12 graphics were placed on there by me.

13 **THE COURT:** Okay.

14 **MR. DePRIMO:** Okay. And that's the same case with  
15 the other photographs.

16 **THE COURT:** All right.

17 **MR. DePRIMO:** The graphics were placed there by me  
18 to try to aid the Court in understanding our case.

19 **THE COURT:** Thank you.

20 **MR. DePRIMO:** There are two buffer zones. In the  
21 forefront of the photograph, Your Honor, we're looking kind  
22 of east to west. Left to right is east to west. Up and  
23 down is north/south. So the bottom of the photograph is  
24 heading north, the top of the photograph is heading south.  
25 To the right is west, to the left in the photograph is east.

1 Pleasant Street is east/west, it's toward the  
2 bottom of the photograph. It runs in front of the Planned  
3 Parenthood building. Dewey Street is about two-thirds or a  
4 third of the way from the right of the photograph. It runs  
5 north and south.

6 The Dewey Street buffer zone is the arrow that's in  
7 the top right-hand corner. See where it is marked in white  
8 "driveway." That's Planned Parenthoods' driveway. It's not  
9 located near the building.

10 Patrons of Planned Parenthood pull into that  
11 driveway, go up the driveway and then make a left-hand turn  
12 and pull into the parking lot. The Court may see in white  
13 where it says "parking lot." The parking lot is next to the  
14 Planned Parenthood building.

15 **THE COURT:** I apologize, I am having trouble  
16 getting oriented.

17 **MR. DePRIMO:** Okay.

18 **THE COURT:** Do you have a pointer that you can use?

19 **MR. DePRIMO:** Yes, okay.

20 Can you see my cursor (indicating)?

21 **THE COURT:** Yes.

22 **MR. DePRIMO:** Okay. This (indicating) is the  
23 building that Planned Parenthood is located in.

24 **THE COURT:** Okay.

25 **MR. DePRIMO:** Behind it is the parking lot for

1 Planned Parenthood.

2 **THE COURT:** I have got it.

3 **MR. DePRIMO:** Whoops, I'm sorry.

4 Behind the parking lot is the driveway. And there  
5 is only one way to enter the driveway and that's through,  
6 that's from Dewey Street. That's where that big arrow is in  
7 the right top-hand corner of the photograph.

8 You can't actually see the buffer zone in this  
9 photograph because it didn't pick up the lines on the  
10 street. We will be able to see them in another photograph.

11 **THE COURT:** Okay. Thank you.

12 **MR. DePRIMO:** There is a second buffer zone that is  
13 in front of Planned Parenthood. It's in the bottom of the  
14 photograph towards the left in front of Planned Parenthood's  
15 building. It's located in front of their building on  
16 Pleasant Street.

17 There are two buffer zones. One in front of the  
18 building on Pleasant Street, the other on Dewey Street at  
19 the driveway, which is far away from the actual building.

20 Do you follow me, Your Honor?

21 **THE COURT:** Yes, I do. Thank you.

22 **MR. DePRIMO:** All right.

23 The buffer on Pleasant Street measures 83 feet, one  
24 inch from edge to edge. Two metal fences are anchored in  
25 front of the building.

1           This (indicating) is a photograph of the front  
2 sidewalk in front of Planned Parenthood on Pleasant Street.  
3 We are looking from west to east so we're looking eastward  
4 right at the edge of the buffer zone. In the bottom of the  
5 photograph you can see the buffer line.

6           So from this edge straight across the sidewalk to  
7 the other end is about 83 feet where the buffer ends.

8           This is another photograph of the buffer on  
9 Pleasant Street. We're looking in kind of a southeasterly,  
10 from a southeasterly point of view we're across the street  
11 on the sidewalk. You can sort of see part of the buffer  
12 line in the forefront of the photograph.

13           This is looking at the buffer line from a  
14 southwesterly perspective from across the street.

15           One of the things I want to point out to His Honor,  
16 if you look at the top left-hand portion of the photograph,  
17 you can see the opening of the fence. So we actually have  
18 two metal fences that are about six feet apart.

19           This (indicating) photograph was provided by the  
20 government. It was taken I believe from the second or third  
21 floor of the Planned Parenthood building. The Court can see  
22 that the crosswalk is directly inside the buffer zone. If  
23 plaintiffs are carrying a sign or wearing any kind of  
24 pro-life clothing, they're forced to cross the street  
25 outside the safety of the crosswalk. If they walk into the

1 crosswalk with a sign or pro-life clothing, they're subject  
2 to criminal penalties up to three months in jail.

3 The buffer zone at the driveway entrance measures  
4 93 feet, 7 inches from edge to edge.

5 This (indicating) is looking into Planned  
6 Parenthood's parking lot from across the street. We are on  
7 Dewey Street. Dewey Street runs north to south. It's  
8 running from, left to right is north to south in this  
9 photograph. We're sort of across the street and we're  
10 looking into Planned Parenthood's driveway. At the very end  
11 of the driveway is part of the parking lot but the main  
12 portion of the parking lot is to the left and it's outside  
13 the photograph.

14 This (indicating) is the buffer zone on Dewey  
15 Street at the driveway looking south. We're looking right  
16 at the, we're at the northerly edge of the buffer zone  
17 looking south.

18 This (indicating) is from the southerly edge of the  
19 parking lot.

20 **THE COURT:** So the parking lot is inside the buffer  
21 zone or not?

22 **MR. DePRIMO:** The parking lot itself, Your Honor,  
23 is on private property. The driveway entrance is in the  
24 buffer, is inside the buffer zone.

25 **THE COURT:** Okay.



1           **MR. DePRIMO:** So the parking lot is probably 150 or  
2       200 feet from the entrance of the driveway off of Dewey  
3       Street. And, of course, it's Planned Parenthood's property,  
4       it's private property. Plaintiffs certainly are not  
5       entitled to be there.

6           When at Planned Parenthood Mark attempts to offer  
7       information about human life, alternatives to abortion and  
8       help to the mother and the unborn baby.

9           Mark wants to show people that he cares and to show  
10      sympathy for what may be a very difficult situation or  
11      decision. It is crucial for Mark to effectively convey his  
12      message before an abortion takes place so he can refer women  
13      to a crisis pregnancy center across the street called  
14      Problem Pregnancy.

15          I don't know if His Honor noticed in the Google map  
16      photograph that we looked at earlier, and I didn't point  
17      this out, but to the bottom left, bottom right of that  
18      photograph it's identified where Problem Pregnancy is.  
19      That's a crisis pregnancy center and that's where people can  
20      be alerted to and informed of alternatives to abortion.

21          Mark attempts to speak with people at a normal  
22      conversational level, with a kind, gentle voice and with eye  
23      contact from a distance of three or four feet.

24          Mark has never observed any vehicle enter a Planned  
25      Parenthood parking lot using the concrete walkway on

1 Pleasant Street. This will become more important as we  
2 continue.

3 The concrete walkway on Pleasant Street is never  
4 used for patron vehicle access to Planned Parenthood.  
5 That's the government's own testimony, security chief  
6 Michael Baniukiewicz. That walkway is not for vehicles.  
7 There is one driveway entrance to Planned Parenthood and  
8 it's on Dewey Street.

9 This (indicating) is looking directly at the steps  
10 and actually at the main door, Your Honor. The main door,  
11 if we look at the very narrow opening in the fence, if we  
12 can see that, the main door is about 35 feet I believe  
13 beyond that fence to the right and most people access that  
14 door coming through the parking lot.

15 If we look at the, if we look at that opening in  
16 the fence from close-up, we can see that it's only about six  
17 feet wide. We can also see that the posts of that fence are  
18 anchored into the cement. They don't appear to be moveable.

19 The metal fences were installed about a year ago.  
20 Before they were installed, Mark could clearly see the main  
21 door of Planned Parenthood while standing on the public  
22 sidewalk outside the buffer zone.

23 This (indicating) is a photograph, Your Honor, of  
24 what it looked like before the fences were installed. To  
25 the left towards the bottom of the photograph we can see the

1 sign, it's kind of a brown background that's right in front  
2 of this white vehicle, that sign has the text of the buffer  
3 law. And we can't actually see it in this photograph, Your  
4 Honor, because of the sun but the buffer line is almost  
5 right adjacent to that sign.

6 So if the Court can imagine, Mark could stand right  
7 at the edge almost of that sign and look at the door. If  
8 you look directly in the middle of the photograph, you can  
9 see the main entrance to Planned Parenthood. It's right in  
10 the very middle of the photograph. It's a metal door with  
11 glass.

12 Before the fence was installed, Mark also could  
13 easily and clearly see persons entering the building and  
14 they could see him.

15 With the fences installed, Mark can't see the main  
16 door or view persons entering the building. At most, he can  
17 catch a fleeting glimpse of patrons through small, narrow  
18 cutouts in the fence.

19 This (indicating) is what Mark sees now, Your  
20 Honor. If he's standing at the edge of that sign, which  
21 actually is probably about three feet from where the  
22 photograph was taken but at the same, kind of in the same  
23 line of vision, this is what Mark sees.

24 When Mark calls out to persons walking from the  
25 Planned Parenthood parking lot to the main door, he can't

1 tell whether they heard him or understood his words because  
2 he can't see them.

3 The combination of fencing and buffer zone renders  
4 Mark's communication attempts ineffective. 85 to 90 percent  
5 of the people who patronize Planned Parenthood enter by the  
6 driveway on Dewey Street. They don't enter by the front on  
7 Pleasant Street.

8 This (indicating), again, Your Honor, is another  
9 photograph, the same one we looked at. The main door, if we  
10 look right in the center of the photograph, the main door is  
11 actually underneath the roof of Planned Parenthood. Planned  
12 Parenthood is either two or three stories, I think it's  
13 three stories but the main door is underneath that. And  
14 people park in the parking lot and they walk into the door.

15 To the right, the other arrow shows the driveway  
16 entrance. So they come up or down Dewey Street, they turn  
17 into the driveway, they go the back of the parking lot.  
18 They take a left and they park somewhere in the lot and then  
19 they walk into the door.

20 By the way, Your Honor, in this photograph you can  
21 see towards the bottom on the right where Problem Pregnancy  
22 is. It's a very short walk, my guess is it's probably 100  
23 yards.

24 As I pointed out, when people park their car in the  
25 parking lot, they walk directly to the main door.

1           Mr. Baniukiewicz, the government's witness,  
2 testified that people "very, very rarely" enter Planned  
3 Parenthood from Pleasant Street. No woman that has parked  
4 her car in Planned Parenthood's lot has ever gone over to  
5 speak with Mark while he was standing on Pleasant Street on  
6 the public sidewalk behind the fence. Not one person has  
7 ever spoken to him.

8           Mark gets no response at all from 99 percent of the  
9 people who enter the main door by way of Planned  
10 Parenthood's parking lot. 99 percent of the people ignore  
11 him completely.

12           Mr. Baniukiewicz has never seen a patron park his  
13 or her car in Worcester Planned Parenthood's parking lot and  
14 then walk back to the street outside the buffer zone either  
15 to take literature or talk with a pro-life person.

16           In the past 18 months since Planned Parenthood has  
17 been at the Pleasant Street location, Mark has been able to  
18 provide in-depth, one-on-one counseling to only six or seven  
19 women seeking services from Planned Parenthood. That's one  
20 every three months. One every three months.

21           With one exception, all of these women sought  
22 access to the main door through the concrete walkway on  
23 Pleasant Street.

24           The need for Mark to raise his voice is often  
25 increased not only by the distance but also by traffic and

1 other ambient noise generated on Pleasant Street, including  
2 cars, trucks, motorcycles, trash haulers, police and fire  
3 sirens or even idling vehicles. Ambient noise makes it  
4 difficult for Mark to hear people and for people to hear  
5 Mark.

6 Noise is not an issue when Mark is able to approach  
7 listeners from a conversational distance of six feet or  
8 less. To the degree that he is able, Mark hands out  
9 literature in English and Spanish describing fetal  
10 development and alternatives to abortion.

11 This (indicating) particular pamphlet is one that  
12 we've already looked at, the same one that Jean Zarrella  
13 hands out. Mark also hands out, as does Nancy, a pamphlet  
14 that talks about the services of Problem Pregnancy. Again,  
15 Your Honor, within visual eyesight of Planned Parenthood  
16 across the street, just a few steps away, this particular --

17 **THE COURT:** You mean the Problem --

18 **MR. DePRIMO:** I'm sorry, Problem Pregnancy, yes.

19 There is contact information on this brochure. If  
20 somebody were to take it, they could contact them at any  
21 time afterwards if they had it in their possession.

22 This (indicating) is also part of that same  
23 brochure and it talks about the different types of services  
24 that are offered. All the services are free and are  
25 confidential.

1           People who are going into Planned Parenthood need  
2       to know before they have an abortion that they can walk a  
3       few feet away and get free services and free confidential  
4       information.

5           Mark doesn't speak Spanish so it is imperative that  
6       he stand near the path of Spanish-speaking passersby so he  
7       can place his literature near their hands.

8           When Mark first began counseling at Planned  
9       Parenthood in its present location, he tried to offer  
10      literature from Dewey Street outside the zone directly  
11      across from the driveway.

12          This (indicating) is the vantage point, Your Honor.  
13      What you can see here is that the buffer zone encompasses  
14      not only the entire street but it actually comes almost four  
15      feet onto the public sidewalk.

16          The white line almost in the middle of the  
17      photograph here (indicating) is the buffer line. Toward the  
18      top of the photograph is the driveway entrance into Planned  
19      Parenthood.

20          This (indicating) is that same buffer zone looking  
21      again from across the driveway but looking in a  
22      southeasterly direction.

23          This (indicating) is the buffer zone looking in a  
24      northeasterly direction. Same buffer zone from across the  
25      street. And, again, Your Honor, you can see that a large

1 portion of the public sidewalk is encompassed by the zone,  
2 not just the street, the entire street plus a fair amount of  
3 public sidewalk.

4 This (indicating) is looking at the buffer zone in  
5 a southwesterly direction, sort of on the same side as where  
6 the driveway is, so we're kind of looking across the street  
7 in this photograph.

8 If pro-lifers want to stand at the edge of the zone  
9 and not be in the middle of the street where they can be  
10 struck by a car as Ms. Metzger and Mr. Baniukiewicz  
11 testified, then they need to stand at the end of that zone  
12 halfway up the sidewalk.

13 **THE COURT:** Why don't we take a ten-minute break  
14 right now. Is that all right for everybody?

15 **MR. DePRIMO:** Yes, Your Honor.

16 **THE CLERK:** All rise for the Honorable Court.  
17 Court is in recess.

18  
19 (Recess.)  
20

21 **THE CLERK:** All rise for the Honorable Court.

22 **THE COURT:** Sit down, everybody. Thank you.  
23 Any time you are ready, go ahead.

24 Is everybody back?

25 **THE CLERK:** Yes, Judge.



1           **MR. DePRIMO:** Your Honor, we were discussing the  
2 buffer zone and that's a driveway on Dewey Street.

3           **THE COURT:** Yes.

4           **MR. DePRIMO:** I just put the photograph up again  
5 just to bring it back to your attention.

6           Mark found his efforts trying to distribute  
7 literature at the driveway futile because people almost  
8 always parked over 200 feet away from him. With only one  
9 exception, no one ever came back to take his literature.  
10 Only one time, Your Honor, did someone park in that lot and  
11 come back to him on Dewey Street to take a piece of his  
12 literature.

13           Measuring in a straight line, it's about 325 feet  
14 from Planned Parenthood's driveway entrance to the far  
15 corner of Planned Parenthood's parking lot near the  
16 building.

17           This (indicating) is a photograph. Again, this is  
18 the same map that we were looking at before. On the  
19 right-hand side where it says "buffer zone," that's the  
20 driveway buffer zone, Dewey Street.

21           The arrow that's sort of pointing to the top corner  
22 to the right, at that edge would be the edge of the buffer  
23 zone or actually the edge of the driveway on Dewey Street.

24           If we kind of go to the left in the photograph to  
25 the other arrow on the opposite side, that's the far corner

1 of Planned Parenthood's parking lot.

2 So in a straight line it's about 325 feet from the  
3 edge of the Dewey Street driveway entrance to the far corner  
4 of Planned Parenthood's parking lot.

5 If a patron pulls into the driveway and parks  
6 towards the north or the northeast of Planned Parenthood's  
7 parking lot, Mark can't see her exit her vehicle or see her  
8 enter the main door when he's standing near the zone on  
9 Dewey Street. It's impossible for Mark to place literature  
10 near the hands of anyone after they enter Planned  
11 Parenthood's driveway because he's always at least 35 feet  
12 away from them.

13 If Mark is on the Pleasant Street side, he is  
14 forced to stand at least 75 feet from the people who park  
15 their cars in Planned Parenthood's lot and then proceed to  
16 the main door. It's about 75 feet from the eastern edge of  
17 that buffer on Pleasant Street to the main door.

18 In Mark's experience standing a few feet from the  
19 driveway presents the best opportunity to hand out  
20 literature and converse with people who are patronizing  
21 Planned Parenthood.

22 Prior to the present buffer law, Mark frequently  
23 handed literature to vehicle occupants entering the  
24 driveway. Now, Your Honor, that was not at 470 Pleasant  
25 Street. That was at the previous location on Lincoln Street

1 but the same principle applied. Planned Parenthood had a  
2 driveway there. And the buffer zone, the old buffer zone  
3 law did not prohibit anybody from standing within any  
4 distance of the driveway.

5 If the Court may recall, the old buffer law, the  
6 old buffer zone law only prohibited people from approaching  
7 within six feet within that 18-foot zone. People could  
8 stand anywhere they want. They could stand at the edge of  
9 the driveway. They could stand right next to the door. All  
10 they couldn't do was approach someone within six feet. If  
11 somebody approached them, that was lawful. That's something  
12 that Mark can't do now, nor can any of the other plaintiffs.

13 Mark was able to hand out that literature on  
14 Lincoln Street when he was a few feet from the driveway's  
15 edge.

16 Mark doesn't hold a sign at Planned Parenthood  
17 either because in his experience it is too impersonal and,  
18 therefore, not very effective for him. For the same reason,  
19 Mark doesn't convey his message over a microphone,  
20 loudspeaker or megaphone.

21 In winter snow piles frame the streets, sidewalks  
22 and driveway at Planned Parenthood. Depending on the  
23 severity of the winter weather, snowfall may be frequent and  
24 snow piles may be as high as four feet. Sometimes the  
25 streets are messy with snow and slush and the public

1 sidewalks are not cleared. At these times it is extremely  
2 difficult to see or maneuver around the zones.

3 This (indicating), Your Honor, is a photograph of  
4 this past winter. We're looking across the street from the  
5 driveway entrance to Planned Parenthood. As the Court can  
6 see, you can't see the buffer lines on the street. You  
7 can't see them near the driveway. If someone were to stand  
8 in the street trying to hand literature to somebody who was  
9 in a vehicle that was moving toward the driveway, if they  
10 ever slipped and fell down, you know, certainly they could  
11 be run over by a moving vehicle.

12 Now, one of the things the government is going to  
13 contend and argue to the Court is that people don't need to  
14 stand next to the edge of the driveway. They can stand in  
15 the middle of the street at the edge of the zone. Well,  
16 this photograph shows you, Your Honor, that, one, you can't  
17 see where the zone is; and, No. two, if you were to stand in  
18 the middle of the street when it's snowy like this, you're  
19 in real danger of serious bodily injury.

20 This (indicating) is a photograph looking south on  
21 Dewey Street. The driveway of Planned Parenthood --

22 **THE COURT:** I suppose you might argue that law  
23 enforcement wouldn't be in a position to even know the  
24 violation.

25 **MR. DePRIMO:** That may be true, Your Honor,

1 certainly.

2 **THE COURT:** If the street is covered for the one  
3 purpose, it is covered for the other too.

4 **MR. DePRIMO:** Certainly a good defense.

5 **THE COURT:** Go ahead.

6 **MR. DePRIMO:** Your Honor, this (indicating) is a  
7 photograph of snow piles in front of Planned Parenthood on  
8 Pleasant Street.

9 One of the things that I want to point out to the  
10 Court in this arrow is that snow piles certainly appear to  
11 be along the entire curb area in front of Pleasant Street.  
12 There may be a small opening at the crosswalk for people to  
13 cross and walk through the pile onto the sidewalk but there  
14 certainly doesn't appear to be any opening there for a  
15 vehicle to be able to maneuver into Planned Parenthood from  
16 Pleasant Street.

17 This (indicating) is another photograph that  
18 depicts the sidewalk area in front of Planned Parenthood.  
19 It's taken from just outside the zone. The Court can see  
20 the buffer zone sign to the left in the photograph.

21 Your Honor, Mark's approach is personal. He  
22 conveys concern and sympathy with his eyes. Close personal  
23 contact is essential for Mark to successfully convey his  
24 message of hope and caring.

25 Mark needs an opportunity to place literature near

1 patrons' hands so they can easily accept it. The Worcester  
2 buffer zones prevent Mark from communicating in either of  
3 those ways with 90 percent of persons entering the Planned  
4 Parenthood facility. Mark cannot reach 90 percent of the  
5 people.

6 **THE COURT:** Again, where do you get that statistic?

7 **MR. DePRIMO:** This is Mark's own testimony and it's  
8 un rebutted, Your Honor.

9 **THE COURT:** Okay. Go ahead.

10 **MR. DePRIMO:** Moving to Nancy Clark. Nancy also  
11 goes to Planned Parenthood in Worcester. She is 49 years  
12 old. Nancy has nine children.

13 Nancy's purpose in going to Planned Parenthood is  
14 not to protest or to condemn, she goes there to save lives.

15 Nancy believes that women generally do not want to  
16 have abortions but often feel forced by boyfriends, parents,  
17 employers, and over social and economic pressures to have an  
18 abortion. That's the very same thing that the government's  
19 own witness Mr. Baniukiewicz said.

20 Nancy has observed young girls and women crying as  
21 they approached Planned Parenthood. Many of these young  
22 girls and women appeared distraught.

23 Nancy observed one woman who was severely bruised  
24 and obviously had been beaten. Some women are so upset  
25 Nancy needs to calm them down even before she can speak with

1       them. It is vulnerable and confused women like these that  
2       Nancy seeks to help.

3               Nancy wants to show people she cares and to show  
4       sympathy for what may be a very difficult situation or  
5       decision. Nancy attempts to do this by offering information  
6       about human life and alternatives to abortion. She also  
7       prays.

8               Nancy wants to makes sure these women truly  
9       understand their options before making an irreversible  
10      choice. Once the abortion occurs, Your Honor, it's gone,  
11      it's done forever. The woman lives with it for the rest of  
12      her life. If she's 15 years old and she lives until she's  
13      75, she lives with that decision for 60 years.

14              With the buffer zone in place, Nancy usually stands  
15      on the public sidewalk on Pleasant Street across the street  
16      from Planned Parenthood. She tries to station herself  
17      directly in front of the main door so she can peer through  
18      the metal fences to see women entering Planned Parenthood.

19              This (indicating) is a photograph, Your Honor, of  
20      Nancy standing across the street on the buffer zone, from  
21      the buffer zone with two other women. This photograph was  
22      provided by the government. It was taken from the second or  
23      third floor of Planned Parenthood.

24              Nancy's about a hundred feet, Your Honor, from the  
25      main door at that location at the edge of the buffer zone.

1 But that's the only place that Nancy can stand that will  
2 allow her even a momentary glimpse of people going into  
3 Planned Parenthood through the main door.

4 The fences are positioned in a way that makes it  
5 very difficult to see behind or through them. This  
6 (indicating) is what Nancy looks at, Your Honor. When she's  
7 standing directly across from the openings in the fence,  
8 that's what she sees. We're talking literally just a  
9 glimpse of people going in and out of that main door.

10 If she stands to the side, Your Honor, she looks at  
11 the building. You can't see the entrance to Planned  
12 Parenthood unless you stand directly in front of the opening  
13 in that photograph. And, again, all you get to see is a  
14 momentary glimpse.

15 Now, obviously Planned Parenthood has the right to  
16 put up fences on its own property, nobody disputes that, but  
17 the fences must be considered in analyzing whether the  
18 buffer zones provide ample avenues of communication.

19 The public sidewalk on Pleasant Street adjacent to  
20 Planned Parenthood is 53 feet, 9 inches from the main door.  
21 The sidewalk is inside the buffer zone.

22 This (indicating) is a photograph of the main door  
23 looking from the main door out to Pleasant Street before the  
24 fence was put up. His Honor can see somebody, it looks like  
25 there are two people in the middle of the photograph that



1 are standing across the street on the sidewalk.

2 The buffer law permits a zone to be established  
3 within a 35-foot radius of entrances and exits to abortion  
4 facilities as well as driveways. Because the buffer zone on  
5 Pleasant Street begins well beyond 35 feet from the main  
6 door, it is not in compliance with the statute. Therefore,  
7 the Pleasant Street buffer zone is unlawful.

8 Because the Pleasant Street zone hinders Mark and  
9 Nancy from effectively communicating their message, the  
10 unlawfulness of the zone must be considered in determining  
11 whether ample alternative avenues exist.

12 On average Nancy is able to converse with less than  
13 one person per week, one person. Rarely does she get more  
14 than a fleeting look from people entering the main door.  
15 Only one woman out of a hundred will make the effort to walk  
16 across Pleasant Street to speak with Nancy. 95 percent of  
17 the people who patronize Planned Parenthood, according to  
18 Nancy, enter Planned Parenthood's driveway, park their car  
19 in the lot and then walk from the lot directly to the main  
20 door. Nancy gets no response at all from 99 percent of the  
21 people who enter Planned Parenthood by way of the parking  
22 lot.

23 Because of noise and distance, Nancy is completely  
24 unable to convey her message to Planned Parenthood patrons  
25 most of the time. To the degree she is able, Nancy hands

1 out literature describing fetal development and alternatives  
2 to abortion. We saw that literature before. It's the same  
3 literature that Mark attempts to hand out.

4 Because Nancy has no access to people who park in  
5 Planned Parenthood's lot, she has no ability to hand  
6 literature to them or place literature near her hands. It  
7 is especially important for Nancy to be able to offer  
8 Spanish literature to Spanish-speaking people because Nancy  
9 does not speak Spanish.

10 In her deposition, for example, Your Honor, Nancy  
11 explained that she tried to communicate for 30 minutes to a  
12 Spanish-speaking woman and had very great difficulty in  
13 trying to communicate because neither one spoke the other's  
14 language.

15 Literature is the only means through which Nancy  
16 can effectively communicate to Spanish-speaking people.

17 Of the hundreds of hours Nancy has spent outside  
18 Planned Parenthood, she was able to converse with people  
19 only 5 percent of the time. In order to best help women  
20 make an informed choice about abortion, Nancy must  
21 communicate with them orally from a normal conversational  
22 distance. She must also have the opportunity to place  
23 literature near their hands so they can easily accept it.

24 The buffer zones prevent Nancy from communicating  
25 in either of those ways with 95 percent of the people she

1 sees entering Planned Parenthood.

2 These are reasons why ample alternatives are  
3 lacking in Worcester.

4 In addition to encountering many of the same  
5 obstacles as the Boston plaintiffs, Mark and Nancy  
6 experience the following additional frustrations to their  
7 speech activities:

8 The metal fences make it virtually impossible for  
9 Mark and Nancy to see patrons entering the main door or for  
10 patrons to see them. When Mark calls out to persons walking  
11 from the parking lot to the main door, he cannot tell  
12 whether they heard him or understood his words.

13 Mark, Your Honor, is about 75 feet away from the  
14 main door. Nancy is at least 100 feet away. So Nancy  
15 likely couldn't hear either.

16 On Pleasant Street the closest Mark or Nancy can  
17 get to the main door is 75 feet. That's the eastern edge of  
18 the buffer zone on Pleasant Street. If they stand across  
19 the street, they're at least a hundred feet away.

20 90 to 95 percent of patrons enter the Dewey Street  
21 driveway and park their cars in the lot. The Dewey Street  
22 entrance is over 300 feet away from the main door. Only  
23 once did a person park in the lot and then go back to accept  
24 literature from Mark when he was near the Dewey Street  
25 entrance.

1           The only effective way for Mark and Nancy to  
2     distribute literature to persons entering Planned  
3     Parenthood's driveway is to offer it to vehicle occupants a  
4     few feet from the driveway's edge.

5           Mark and Nancy get no response from 99 percent of  
6     the people who enter the main door after parking in the lot.

7           In the last 18 months, again, Mark was able to  
8     counsel only six or seven people. Nancy standing outside  
9     the zone could communicate with only people five percent of  
10    the time.

11          And now we will move to Planned Parenthood in  
12    Springfield.

13          Dr. Shea is our Springfield Planned Parenthood  
14    plaintiff. He is 84 years old. He is a grandfather. He is  
15    a father and a grandfather and a great grandfather. He is a  
16    retired orthopedic surgeon. Dr. Shea was in the Korean War.  
17    He served as a field and battalion surgeon with the Marines.

18          Planned Parenthood in Worcester is located in one  
19    of three buildings at a large medical complex. Five  
20    driveways provide ingress and egress to the medical complex.

21          This (indicating) is a Google photograph, Your  
22    Honor, of the complex at Planned Parenthood in Springfield.  
23    I will try to describe it as best I can.

24          This complex is located on the corner of Wason  
25    Avenue and Main Street. Main Street runs north and south.

1 It's running back and forth across the bottom of the  
2 photograph. You can sort of see it at the very bottom.  
3 Wason Avenue runs east and west. It's to the left side of  
4 the photograph.

5 If the Court looks at the top left-hand side of the  
6 photograph, there's a buffer zone, that's the main driveway  
7 for people who are entering and presumably parking and going  
8 into Planned Parenthood's facility.

9 There are three buildings, Your Honor, at this  
10 complex. One building is sort of, it's on the left-hand  
11 side sort of maybe a third of the way up. It has American  
12 Red Cross written across it. The white is the roof of the  
13 building.

14 If the Court would look directly above that  
15 building, it sees -- the Court would see the words "main PP  
16 driveway." That's the main driveway to Planned Parenthood  
17 according to security chief Michael Baniukiewicz. He also  
18 says that that area there sort of in between American Red  
19 Cross and sort of going to the top of the photograph is the  
20 main parking lot for Planned Parenthood. That's  
21 Mr. Baniukiewicz's testimony.

22 Toward the top of the photograph not quite in the  
23 middle there is kind of a rectangular building, kind of a  
24 thin, rectangular building. I wrote the words "Planned  
25 Parenthood" on the roof of that building. Can the Court see

1 that?

2 **THE COURT:** No.

3 **MR. DePRIMO:** There is an arrow pointing that says  
4 "main door." "Main door" is in yellow. It would be sort of  
5 to the left. Let me see if I can use my cursor.

6 Do you see that (indicating), Your Honor, my  
7 cursor?

8 **THE COURT:** Yes.

9 **MR. DePRIMO:** Planned Parenthood is located in this  
10 building that's got sort of the grayish brown roof.

11 **THE COURT:** Okay.

12 **MR. DePRIMO:** Attached to this building with the  
13 grayish brown roof are two towers. That's sort of one  
14 building. The second building is the American Red Cross  
15 building, sort of to the left toward the bottom, more toward  
16 the bottom from where Planned Parenthood is.

17 And then the third building, Your Honor, is to the  
18 far right of the photograph. We can only see part of it.  
19 The white sort of -- that runs from halfway all the way up  
20 to the top, that white is the roof of the third building.

21 So what we're looking at here, Your Honor, are sort  
22 of parking spaces and a parking lot that services all three  
23 of these buildings.

24 Now, there are five buffer zones that are located  
25 at this complex because there are five driveways. Two of

1       them are on Wason Avenue. And the Court can actually see  
2       the arc of the buffer zone in the photograph if it looks  
3       very closely. If the Court looks on Wason Avenue to the  
4       left, sort of toward the lower left-hand side of the  
5       photograph, kind of where my cursor is?

6               **THE COURT:** Yes.

7               **MR. DePRIMO:** The Court can see the line there  
8       where the buffer zone is. That's the eastern buffer zone  
9       that's on Wason Avenue.

10              As I push my cursor up Wason Avenue there is  
11      another buffer zone right here (indicating). That's the  
12      buffer zone on the western portion of Wason Avenue.

13              And then as I pull my cursor down to the bottom of  
14      the page and then sort of pull it toward the right, the  
15      Court can see three arcs in succession along Main Street.  
16      And you've got arrows there pointing to the buffer zone.

17              So three buffer zones on Main Street, two buffer  
18      zones on Wason Avenue.

19              Ready?

20              **THE COURT:** Yes.

21              **MR. DePRIMO:** Your Honor, over 20 separate medical  
22      businesses are located in that complex as is a Subway  
23      restaurant.

24              This (indicating) is the business directory for 355  
25      (sic) Main Street. Planned Parenthood is located in this

1 particular building. We can see that Baystate Reference  
2 Laboratories is in this particular building. Hand Center of  
3 Western Massachusetts, NovaCare Hand and Upper Extremity  
4 Rehabilitation, NovaCare Rehabilitation and Physical  
5 Therapy, Pioneer Valley Surgicenter, Planned Parenthood  
6 League of Massachusetts, Valley Medical Associates and  
7 Valley Women's Health Group.

8 This (indicating) is the sign on the other side of  
9 the building. It's got the same businesses on it. Again,  
10 355 (sic) Main Street.

11 By the way, Your Honor, at this medical complex are  
12 three addresses: 3500 Main Street, 3550 Main Street and  
13 3640 Main Street. Three addresses, one large medical  
14 complex.

15 Here (indicating) is a sign on the building that  
16 houses the American Red Cross. Also a sign that, for  
17 Baystate Cardiovascular Program.

18 These are signs here (indicating) that point to an  
19 ear, nose and throat office. Also kind of a sandwich sign  
20 that talks about the blood donor center at the Red Cross.

21 Buffer zones at multipurpose office buildings are  
22 constitutionally suspect. For example, in Hoye the Ninth  
23 Circuit observed, "In Hill the Supreme Court expressly  
24 invited as applied challenges where," quoting the Supreme  
25 Court, that should not be in double quotes there, "'Special



1 problems arise because clinics have particularly wide  
2 entrances or are situated within multipurpose office  
3 buildings.'"

4 The Supreme Court in Hill, even though it upheld  
5 that floating buffer zone in that case, said that even a  
6 floating buffer zone is constitutionally suspect at a  
7 multipurpose office building. That's what we're dealing  
8 with in Springfield.

9 Because the medical complex houses 20 separate and  
10 distinct businesses, it is impossible for Dr. Shea to know  
11 which business or businesses a person intends to patronize  
12 when the person enters the medical complex. It is,  
13 therefore, impossible for Dr. Shea to identify with  
14 particularity who might be patronizing Planned Parenthood  
15 unless he is told. So unless somebody in a vehicle or  
16 somebody comes over to him and says, hey, look, I'm going  
17 into Planned Parenthood, there is no way for Dr. Shea to  
18 know that.

19 Kristen Metzger agrees that it's not possible, it's  
20 not possible to identify which business these people intend  
21 to patronize.

22 As I mentioned, there are five wide arcs  
23 surrounding each of the five driveways. Signs containing  
24 the buffer law are situated in two of the five arcs, one on  
25 Main Street and the other on Wason Avenue.

1           The first buffer zone is at the west driveway  
2 entrance off Wason Avenue. That's the one that's directly  
3 in front of the building housing Planned Parenthood. A sign  
4 with the buffer statute language is situated at that  
5 location.

6           This (indicating) is looking into that driveway and  
7 parking lot. The building in the background is the building  
8 that houses Planned Parenthood. The arrow points to the  
9 text of the buffer law. You can see the white line in the  
10 forefront. That's the buffer zone.

11           The buffer zone measures 100 feet, 5 inches in a  
12 straight line from edge to edge along the public sidewalk.  
13 A 100-foot buffer zone, Your Honor. The maximum buffer zone  
14 is 36 feet.

15           The driveway entrance is 206 feet, 5 inches from  
16 the main door. It's over 200 feet from the driveway  
17 entrance to the door where people enter into Planned  
18 Parenthood. And the testimony in the record is that Planned  
19 Parenthood is on the second floor of that building.

20           The buffer zone makes it impossible to get close to  
21 that driveway entrance.

22           The buffer zone is 35 feet of the eastern line or  
23 the western line of the buffer zone is 35 feet away from the  
24 edge of the driveway. The distance from the top of the arc  
25 to the curb opposite the driveway is 12 feet, 5 inches.

1           That's (indicating) a photograph of Dr. Shea with a  
2           sign standing at the top of the buffer zone.

3           This (indicating) is a photograph of the buffer  
4           zone looking northeast from across the street.

5           This (indicating) is looking west at that same  
6           buffer zone. You can see in the middle of the photograph to  
7           the right 355 (sic) Main Street.

8           The second buffer zone is at the east driveway  
9           entrance off Wason Avenue. This (indicating) is a  
10          photograph of that particular buffer zone. That buffer zone  
11          is 95 feet, 5 inches in a straight line from edge to edge.

12          This (indicating) is a photograph looking easterly  
13          from the western edge of that particular buffer zone.  
14          People are turning off of Main Street in the background onto  
15          Wason Avenue.

16          This (indicating) is looking at the eastern buffer  
17          zone looking southwest from the eastern edge of that zone.

18          The third buffer zone is at the south driveway off  
19          Main Street. And, Your Honor, if you recall the original  
20          Google map, what I'm doing is I'm starting at the top of  
21          that map on Wason Avenue and going down and around to Main  
22          Street. So the first buffer zone that I'm talking about  
23          would have been in the top left-hand corner of that  
24          photograph, the second in the bottom left-hand corner of  
25          that photograph, the next, sort of to the bottom on the

1 left, then in the middle, then to the right, just to make it  
2 clear.

3 This (indicating) is a photograph of the southern  
4 driveway. That buffer zone measures 99 feet, 9 inches in a  
5 street line from edge to edge.

6 Here's (indicating) a photograph of that buffer  
7 line. You'll notice across the street, Your Honor, there  
8 are no sidewalks and that's a very hilly area and it's  
9 fenced off.

10 The fourth buffer zone is at the middle driveway  
11 entrance off of Main Street. There is a sign with the  
12 buffer statute language posted or situated at that location  
13 and there is a photograph of that sign.

14 The middle buffer zone measures 99 feet, 1 inch in  
15 a straight line from edge to edge.

16 A photograph (indicating) of the second or the  
17 middle buffer zone on Main Street.

18 According to Mr. Baniukiewicz, Planned Parenthood  
19 patrons very rarely use the Main Street driveway entrance.  
20 The sidewalk, the sidewalk at the middle driveway off Main  
21 Street is at least 316 feet, 2 inches from the door of  
22 Planned Parenthood. That's over 100 yards and that's over  
23 the length of a football field.

24 This (indicating) is looking back at 355 (sic) Main  
25 Street where Planned Parenthood is housed from the edge of

1 the middle buffer zone. About 350 feet more or less.

2 Kristen Metzger testified that the distance from  
3 the door to the Main Street sidewalk is 352 feet, 2 inches.  
4 And it depends, Your Honor, where exactly you're measuring.  
5 If you're measuring in the middle of the buffer zone, it may  
6 be 316. If you measure off to the other edge, it's 350.

7 Again, a little bit different vantage point looking  
8 at the building housing Planned Parenthood from the Main  
9 Street buffer zone. We can see it's well in the background.

10 These photographs were provided by the government.

11 The fifth buffer zone is located at the northern  
12 driveway off Main Street. This (indicating) is a photograph  
13 of this buffer zone looking north.

14 A photograph (indicating) of the buffer zone  
15 looking south. You can see Dr. Shea standing next to the  
16 3640 Main Street sign.

17 The northern buffer zone measures 100 feet, 2  
18 inches in a straight line from edge to edge along the public  
19 sidewalk.

20 Now we'll discuss Dr. Shea's activities.

21 When Dr. Shea is at Planned Parenthood, he attempts  
22 to persuade men and women not to abort their babies by  
23 helping them make an informed decision.

24 Dr. Shea's intended audience is persons seeking  
25 abortions. To help these women make an informed decision,

1 Dr. Shea tries to offer medical information on the risks of  
2 surgery and the gestational process of human beings.

3 Dr. Shea is a medical doctor.

4 When at Planned Parenthood, Dr. Shea often dangles  
5 a sign from his neck that states, "They're killing babies  
6 here." This (indicating) is a photograph of the sign  
7 Dr. Shea wears.

8 Dr. Shea often walks back and forth on the L-shaped  
9 public sidewalk that frames the medical complex.

10 Prior to enactment of the buffer law, he often  
11 walked with his sign. The perimeter of the sidewalk on  
12 Wason Avenue is 514 feet, 10 inches. The blue line, the  
13 blue arrow on the left-hand side is the perimeter of the  
14 sidewalk, 514 feet along Wason Avenue.

15 The perimeter on Main Street is 906 feet, 2 inches.  
16 The arrow at the bottom of this photograph is the perimeter  
17 along Main Street, 906 feet. Together that's about 1420  
18 feet of public sidewalk, 1421 feet of public sidewalk that  
19 surrounds the medical complex, or at least is adjoining to  
20 it.

21 Dr. Shea cannot avoid the zones by walking in the  
22 grassy areas or parking lots of the medical complex because  
23 private property, no trespassing signs are situated at every  
24 driveway entrance to the complex.

25 Main Street is a major thoroughfare in Springfield

1 and is often busy with vehicular traffic, including cars,  
2 trucks, heavy construction equipment, vans, motorcycles and  
3 buses.

4 Because there is so much dangerous traffic,  
5 Dr. Shea is reluctant to cross the street merely to avoid  
6 the zones because he fears for his safety.

7 This (indicating) is Wason Avenue. We can see on  
8 the right side of the photograph it looks like a dump truck  
9 is coming down the street.

10 This (indicating) is a photograph I believe, Your  
11 Honor, provided by the government. That shows three  
12 vehicles traveling on Wason Avenue.

13 This (indicating) is a photograph, again, provided  
14 by the government, that shows a van on Wason Avenue right in  
15 front of the driveway entrance.

16 This (indicating) is Main Street with a large truck  
17 driving across right through the buffer zone.

18 More vehicle traffic on Main Street.

19 Your Honor, as Dr. Shea understands the law, the  
20 existence of the five zones means he cannot walk with his  
21 sign along much of the public sidewalk adjacent to the  
22 medical complex without risking arrest and incarceration.

23 Though no warning signs are situated inside three  
24 of the five zones, Dr. Shea does not know whether he can  
25 lawfully enter them.

1 All five white arcs are nearly identical in size  
2 and shape. We've looked at this photograph before, Your  
3 Honor. There are no graphics on this. I left it blank so  
4 the Court can clearly see along the streets where the buffer  
5 zone arcs are and how they look almost identical. Three  
6 along Main Street on the bottom of the photograph, two of  
7 them on Wason Avenue along the left edge of the photograph.

8 The white arcs confuse Dr. Shea. No one has  
9 informed Dr. Shea that he may enter or walk through one or  
10 more of those three zones with his sign without risking  
11 arrest and incarceration.

12 At times frequent noise created by vehicles makes  
13 even face-to-face conversation difficult. It makes oral  
14 communication at a distance impossible. This is Dr. Shea's  
15 own testimony.

16 Dr. Shea never shouts because he believes it  
17 irritates strangers and, therefore, is counterproductive.  
18 To the degree he's able, Dr. Shea hands out literature in  
19 English and Spanish describing fetal development,  
20 alternatives to abortion, the risks of abortion, and  
21 contraceptives.

22 This (indicating) is one of the pieces of  
23 literature that Dr. Shea tries to hand out. The Court can  
24 see that it's very heavily annotated. There are endnotes on  
25 the back of the pamphlet. There is contact information on



1 the back of the pamphlet.

2 This (indicating) is the center part of that same  
3 pamphlet. It contains very detailed, a very detailed  
4 biological chronology of a human life.

5 As a medical doctor Dr. Shea is very well qualified  
6 to discuss fetal development.

7 This (indicating) is another handout that Dr. Shea  
8 attempts to give out. It's for a crisis pregnancy care  
9 center called Bethlehem House. We can see that there is  
10 contact information on this brochure. We can see also, Your  
11 Honor, that there are many free services that are provided  
12 at this particular pregnancy care center. And there are  
13 other services as well that are offered.

14 This (indicating) is another piece of literature  
15 that Dr. Shea hands out called "Choice or Child." This is  
16 the back of that particular pamphlet. It discusses myths  
17 versus facts. Who better than a medical doctor to be able  
18 to discuss myths versus facts when it talks about, talking  
19 about human life. There is also contact information on this  
20 particular piece of literature.

21 This (indicating) is another handout of Dr. Shea's.  
22 It's the story of Hope, a woman who was conceived in rape  
23 and her mother, despite the rape, chose to give birth. It's  
24 footnoted. There is contact information on this particular  
25 brochure.

1           This (indicating) is the same pamphlet, the other  
2 side of it.

3           This (indicating) is another handout that talks in  
4 terms of contraception called, "Abortion in Disguise." It  
5 has contact information. It's very heavily documented with  
6 endnotes.

7           This type of information, Your Honor, is not the  
8 type of information one can put on a sign nor is it the type  
9 of information that one can convey in a very short oral  
10 communication.

11           This (indicating) is the same pamphlet I believe,  
12 the inside of it.

13           This (indicating) is another pamphlet for Rachel's  
14 Vineyard Weekends. This is sort of a spiritual journey for  
15 women who have had abortions. Women who regret it, woman  
16 who are hurting because of abortion. There is a schedule on  
17 this of when these particular seminars take place. There is  
18 contact information so people can call.

19           Post abortion counseling. This is the same  
20 brochure, the other side.

21           Dr. Shea does not speak Spanish so he can  
22 communicate to Spanish-speaking people only through  
23 literature.

24           We saw this piece of literature earlier in English.  
25 This is the same piece of literature in Spanish. At least I

1 think it is but I don't speak Spanish so I don't know.

2 Again, same piece of literature (indicating), the  
3 other side in Spanish.

4 This is the Bethlehem Pregnancy Care Center  
5 pamphlet, again, in Spanish. Contact information, free  
6 services, other services.

7 The only way that Dr. Shea can communicate with  
8 Spanish-speaking people is through Spanish literature. 90  
9 percent of the people patronizing the businesses of the  
10 medical complex arrive by car and park in one of several  
11 lots.

12 The government's own witness Mr. Baniukiewicz  
13 admitted because of the distance between the public sidewalk  
14 and the entrance to Planned Parenthood, the only opportunity  
15 for pro-life communication is at the west driveway on Wason  
16 Avenue. This is the security chief for Planned Parenthood.  
17 That's his admission.

18 No one has ever parked her car and returned to the  
19 sidewalk area where Dr. Shea was to take his literature.

20 Less than five percent of the persons who park  
21 their cars return to the public sidewalk for literature or  
22 pro-life counseling. Those are Dr. Shea's observations that  
23 he experiences.

24 Since the buffer zones were established two or  
25 three years ago, Dr. Shea has distributed no more than two

1 or three pieces of literature. That's one, that's less than  
2 one piece of literature per year in three and a half years.

3 Ms. Metzger did not observe anyone park their car  
4 in either Worcester or Springfield parking lots and then  
5 walk back to pro-life persons on the public sidewalk.

6 Ms. Metzger admitted it's much easier for vehicle  
7 occupants to pause briefly at the driveway, roll down their  
8 windows and then accept literature rather than parking their  
9 car and then making the long walk back to the public  
10 sidewalk.

11 It is Dr. Shea's desire to give his literature to  
12 every person patronizing Planned Parenthood.

13 The buffer zones prevent Dr. Shea from offering  
14 literature at the edge of the driveways near the path of  
15 vehicles. Thus, the zones make it virtually impossible for  
16 Dr. Shea to distribute literature.

17 Though people can see it, Dr. Shea's sign is not a  
18 substitute for personal individual counseling. His desire  
19 is to persuade, not merely to be seen.

20 And as the Supreme Court told us earlier in this  
21 presentation, people have the right to try to persuade  
22 people, not merely to be seen.

23 In Dr. Shea's experience, persons are persuaded  
24 through gentle and informative one-on-one counseling at  
25 close range. It is impossible for Dr. Shea to convey fetal

1 development or the risks of abortion in only a few  
2 sentences.

3 As a retired medical doctor and military surgeon,  
4 the knowledge and perspective Dr. Shea brings to a  
5 conversation is considerably different from the knowledge  
6 and perspective other pro-life councilors can bring.

7 In winter, Your Honor, snow piles frame the  
8 sidewalks and driveways of the medical complex.

9 This (indicating) is a photograph of Dr. Shea this  
10 past winter at the west edge of the east buffer zone on  
11 Wason Avenue. The Court can see that there is a snow pile  
12 between the street and the sidewalk. On both sides of the  
13 sidewalk actually.

14 Here is another photograph (indicating). This is  
15 the corner of Main Street and Wason Avenue. The sidewalk is  
16 clear but as Your Honor can see, there are large piles of  
17 snow on either side of this sidewalk.

18 This (indicating) is looking north along Main  
19 Street, sort of the middle of the middle driveway on Main  
20 Street. You can see lots of snow on the sidewalk and,  
21 again, we see piles of snow framing those sidewalks.

22 This (indicating) is a photograph sort of at the  
23 edge of the driveway at the west -- the eastern driveway on  
24 Wason Avenue.

25 With piles of snow, Your Honor, there are very few

1 areas of the sidewalk where Dr. Shea can walk with his sign  
2 without violating the buffer law because he can't access the  
3 sidewalk except through forbidden driveways. If Dr. Shea  
4 had the sign dangling from his neck and walked through the  
5 buffer zone at the driveway just to get to the sidewalk, he  
6 would be in violation of the law and could go to jail for  
7 three months.

8 Reasons ample alternatives are lacking in  
9 Springfield. In addition to the same, many of the same  
10 obstacles as the Boston and Worcester plaintiffs, Dr. Shea  
11 experiences these additional hindrances to his speech  
12 activities:

13 Planned Parenthood is in a diverse medical complex  
14 serviced by five driveways. It is impossible to tell which  
15 vehicle occupants are intent on patronizing Planned  
16 Parenthood. 90 percent of the people park in the driveway.  
17 No one has ever parked their car in the medical complex  
18 parking lot and then returned to Dr. Shea to take his  
19 literature.

20 Less than five percent of persons who park their  
21 cars return to the public sidewalk for literature or  
22 pro-life counseling. That means that 95 percent of the  
23 people who park their cars simply park and then walk  
24 directly into the building housing Planned Parenthood.

25 Dr. Shea has no opportunity to reach 95 percent of

1 the people who park in this parking lot.

2 Dr. Shea has only distributed two or three pieces  
3 of literature in the last two or three years. It is  
4 undisputed that the only opportunity for effective pro-life  
5 communication is at the west driveway on Wason Avenue.  
6 That's the driveway directly in front of the building  
7 housing Planned Parenthood.

8 The only place that Dr. Shea can engage in  
9 effective oral speech or literature distribution is to stand  
10 a few feet from the edge of the west Wason Avenue driveway.  
11 That area is squarely within the buffer zone.

12 The multiple buffer zones prevent Dr. Shea from  
13 peacefully and quietly walking back and forth along the  
14 entire public sidewalk when his abortion-related sign is  
15 dangling from his neck.

16 Dr. Shea can't even walk on a public sidewalk  
17 without risking arrest under this buffer law as it applies  
18 to Planned Parenthood in Springfield.

19 Dr. Shea is 84 years old. It was unreasonable for  
20 the government to force him to choose between crossing busy  
21 streets or risking arrest for violating the buffer law  
22 simply because he has an abortion-related sign with him as  
23 he peacefully walks up and down the public sidewalk.

24 In its proposed findings and conclusions that have  
25 already been submitted to the Court, the government concedes

1 that the buffer law cannot be enforced at three, at the  
2 three challenged driveways in Springfield where buffer law  
3 signs are not situated.

4 Wrapping up, Your Honor, plaintiffs' ability (sic)  
5 to effectively convey --

6 **THE COURT:** Inability.

7 **MR. DePRIMO:** -- their messages to large  
8 segments --

9 **THE COURT:** Plaintiffs' inability.

10 **MR. DePRIMO:** Plaintiffs -- let me rephrase.

11 Plaintiffs' inability to effectively convey their  
12 messages to large segments of their intended audiences is  
13 undisputed. Undisputed.

14 In all important respects, the government's own  
15 witnesses corroborated plaintiffs' testimony. The  
16 government has presented no testimony with respect to which  
17 methods of communication are effective and which are not.  
18 No experts, no fact witnesses. With the exception of Greg  
19 Smith, plaintiffs have demonstrated that close, personal  
20 contact is vital in order to communicate effectively with  
21 Planned Parenthood patrons.

22 When communicating orally, plaintiffs need to be  
23 within a normal conversational distance so they can smile,  
24 make eye contact and demonstrate sincerity and compassion.

25 When distributing literature, plaintiffs need to



1 stand near the path of passersby or vehicles so the  
2 literature can be easily accepted.

3 The buffer zones prevent plaintiffs from  
4 communicating effectively, again, with large segments of  
5 their intended audience.

6 For the foregoing reasons, the buffer law should be  
7 declare unconstitutional as applied in each of the  
8 challenged locations and its enforcement should be  
9 permanently enjoined.

10 And that's all we have at this time, Your Honor.

11 **THE COURT:** All right. Are you ready to go?

12 **MR. SALINGER:** Yes, good afternoon, Your Honor. I  
13 am expecting it will take me 30 to 40 minutes to present our  
14 closing argument. Shall I proceed?

15 **THE COURT:** Go ahead. Would you rather take a  
16 luncheon recess now and then begin?

17 **MR. SALINGER:** Whatever is your preference, Your  
18 Honor. If you --

19 **THE COURT:** Well, you say 30 or 40 minutes. I am  
20 going to break into your presentation at one o'clock if I  
21 let you start now.

22 **MR. SALINGER:** Well, then perhaps we should take a  
23 lunch break.

24 **THE COURT:** Yes, I would rather not break into  
25 your --

1                   **MR. SALINGER:** Great.

2                   **THE COURT:** Why don't we -- let's see, it's 12:30.  
3 Why don't we try to come back at 1:45, okay.

4                   **MR. SALINGER:** We will be here at 1:45. Thank you,  
5 Your Honor.

6                   **THE CLERK:** All rise for the Honorable Court.

7 Court is in recess.

8 (Luncheon recess.)  
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**AFTERNOON PROCEEDINGS**

**THE CLERK:** All rise for the Honorable Court.

**THE COURT:** Good afternoon, Everybody.

**VOICES:** Good afternoon, Your Honor.

**THE COURT:** Please be seated. Sorry to keep you waiting.

We are ready to go I guess.

**MR. SALINGER:** Yes, Your Honor.

Your Honor, our affirmative case is based primarily on the plaintiffs' own testimony, testimony of their depositions, we examined them, subsequent testimony that was submitted through declarations. That evidence is bolstered by the testimony by Kristen Metzger whose name you heard. She's an investigator who works for the Attorney General's Office.

If I may, I'd like to --

**THE COURT:** She testified in one of the other cases; didn't she?

**MR. SALINGER:** Ms. Metzger, no.

**THE COURT:** No? All right.

**MR. SALINGER:** I thought it might be most helpful, Your Honor, if I summarized for each clinic what our affirmative case is, what the evidence shows, and then at the end I've got a few really rebuttal points about why some of the points that plaintiffs are raising we submit are not

1 relevant.

2 The context, as you know, is that in December of  
3 2010 Your Honor ruled that there is one issue left to be  
4 decided in this case and that's the question of whether the  
5 buffer zone statute as applied at the three clinics now at  
6 issue in the complaint leaves open adequate alternative  
7 channels of communication.

8 The First Circuit in the Sullivan versus Augusta  
9 decision, for example, among others, tells us what the  
10 standard of that is, the standard of the adequacy of  
11 alternative channels is whether people can still have an  
12 opportunity to get their message out. Plaintiffs' own  
13 testimony demonstrates that they can and do share their  
14 messages outside the buffer zones at the Boston, Worcester  
15 and Springfield clinics and, thus, that evidence shows that  
16 the Act as applied leaves open ample and adequate  
17 alternative channels of communication.

18 So starting with the Boston clinic, I thought I'd  
19 follow plaintiffs' lead and work from east to west.

20 **THE COURT:** Go ahead.

21 **MR. SALINGER:** You'll recall the photos of the  
22 clinic building there on Commonwealth Avenue. Just a tiny  
23 bit more context.

24 The evidence shows that all clinic patients enter  
25 on foot through that front door which faces out onto

1 Commonwealth Avenue. The sidewalk there is about 25 feet  
2 wide and the buffer zone, you saw pictures of it arcing  
3 around the front door, so if you were standing there on  
4 Comm. Ave. looking at the building like the picture showed,  
5 to the right the full width of the sidewalk is open and  
6 plaintiffs can go there, to the left on the other side of  
7 Alcorn Street, so right in front of the Star Market on the  
8 corner, that entire 25-foot wide sidewalk is open to the  
9 plaintiffs.

10 And right in front of the clinic the zone arcs out  
11 and you saw there was space on both sides between the edge  
12 of the buffer zone and the edge of the sidewalk, including  
13 right on the corner of Alcorn Street, there is a strip there  
14 where Ms. McCullen and other plaintiffs testified that they  
15 do, in fact, from time to time stand right in that spot as  
16 they're conversing with people who they think may be heading  
17 to or just left the clinic.

18 Now, Ms. McCullen, as you heard, what she wants to  
19 do is she wants to go stand on the sidewalk outside the  
20 Boston clinic, try to speak with women who may be going to  
21 the clinic, ideally women who are pregnant, and attempt to  
22 convince them that if they were going to Planned Parenthood  
23 for abortion services not to have an abortion.

24 Ms. McCullen's own testimony at her deposition is  
25 that since the buffer zone law was changed in November of

1 2007, she continues to be very successful doing just that.  
2 She has many, many conversations with women on the sidewalk.  
3 And by Ms. McCullen's own reckoning, probably at least 80  
4 times between November of 2007 and when she was deposed just  
5 a few months ago she has, in fact, succeeded through those  
6 conversations in convincing women not to have an abortion,  
7 exactly what she says she wants to do.

8 Ms. McCullen's method is to try to strike up  
9 conversations with people who are passing by on the  
10 sidewalk. She testified that she usually teams up with  
11 another woman whose name is Mary O'Donnell. Usually  
12 Ms. McCullen will stand on one side of the clinic so people  
13 walking down the buffer zone -- I'm sorry -- walking down  
14 the sidewalk toward the clinic from one direction, she can  
15 approach, Mary O'Donnell will be on the other side and can  
16 approach women who are walking from the other direction.

17 Ms. McCullen testified that typically she is able  
18 to make some sort of offer of help to women, most of whom  
19 are not interested in talking to her. They hear  
20 Ms. McCullen's message but they make clear no, I'm not  
21 interested and they go on their way.

22 A fair number of women stop and talk with  
23 Ms. McCullen. She's very successful in having those  
24 conversations. She's testified that sometimes she has  
25 conversations for just a few moments. She hands out

1 literature, as you heard. You saw the various pamphlets  
2 that she hands out and you heard that she includes in that a  
3 business card with her phone number.

4 Her conversations often get to the point where  
5 women will go with her to a car. She gets there early in  
6 the morning. She usually goes Tuesday and Wednesday  
7 mornings and she goes before other people are parked so she  
8 gets the very first spot nearest to the clinic and women  
9 will often walk with Eleanor she testified to continue a  
10 conversation with her in her car.

11 The literature, her testimony is most days that  
12 she's there at least 15 or 20 people will accept from her  
13 the literature that she's offering, including that card with  
14 her phone number. And she also testified that quite  
15 frequently women who have taken that literature with her  
16 business card will call her at home on that phone number and  
17 continue a conversation.

18 So despite the buffer zone that prevents  
19 Ms. McCullen from standing right next to the doorway the way  
20 she would prefer to, she is, in fact, able to offer and  
21 share the message that she wants to on that sidewalk outside  
22 the Boston clinic.

23 When she parks her car, I should also note, she has  
24 some signs on it so that's another way that she  
25 communicates. Plaintiffs' counsel noted that Ms. McCullen

1 doesn't like to stand with a sign but she also testified  
2 that on the car right near the clinic, that first spot, she  
3 has magnetic signs affixed that say, "Abortion stops a  
4 beating heart." And she has a larger sign that she has on  
5 the ground on the sidewalk leaning against the car right by  
6 the curb there which at the top says, "Pregnant?" with a  
7 question mark, it has a picture of a woman, lists the name  
8 of A Woman's Concern, this is alternative help that  
9 Mr. DePrimo referred to, and has a phone number.

10 And Ms. McCullen testified that all of that can be  
11 seen by people walking past the car, either through the  
12 buffer zone to the other side or into the clinic. So in all  
13 of these ways Ms. McCullen can and does communicate her  
14 message outside the Boston clinic.

15 Plaintiff Jean Zarrella. Similarly she wants,  
16 according to her testimony, to offer help and literature to  
17 women who may be pregnant. Ms. Zarrella typically goes on  
18 Saturday mornings to the Boston clinic. Saturday mornings  
19 happen to be a popular day for other anti-abortion  
20 protestors, councilors, prayer groups of different kinds, to  
21 also go to the Boston clinic. And so Ms. Zarrella observes  
22 many other people succeeding in offering and sharing their  
23 message outside the Boston clinic.

24 Ms. Zarrella testified that her practice when a  
25 woman is walking near her is to ask, "May I help you." And



1 she also testified that women almost always respond to her  
2 typically by saying "no" and continuing to walk but that  
3 doesn't indicate that Ms. Zarrella can't communicate her  
4 message. That indicates that the woman has no interest in  
5 further conversation which, of course, is that woman's  
6 constitutional right.

7 Ms. Zarrella testified that she offers literature  
8 and about half the women who go by her take the literature  
9 from her. And so, again, this is another way where she can  
10 and does communicate her message on the public sidewalk  
11 outside the Boston clinic.

12 Ms. Zarrella is often joined by a woman on Saturday  
13 mornings who comes equipped not only with signs but with  
14 metal holders that she can place on the sidewalk outside the  
15 buffer zone that will hold up the sign while the woman is  
16 trying to communicate and converse with people on the  
17 sidewalk. And the sign that that woman usually brings that  
18 Ms. Zarrella sees so many Saturday mornings says, "Take my  
19 hand, not my life."

20 Ms. Zarrella testified that she regularly sees and  
21 can hear other anti-abortion protestors or counselors  
22 holding signs, handing out literature, speaking with women  
23 walking by on the sidewalk and praying out loud in a group  
24 in a manner that Ms. Zarrella standing on the other side of  
25 the buffer zone can hear. So she's not only testified to

1 her own ability to share a message there on the sidewalk  
2 outside the buffer zone but observes other people doing it  
3 most Saturdays.

4 Your Honor, a third plaintiff who is interested in  
5 communicating outside the Boston clinic is Gregory Smith.  
6 Mr. Smith wants to pray out loud, typically with others, and  
7 be seen and heard by passersby while engaged in prayer, and  
8 he successfully does that.

9 He goes there most Saturday mornings according to  
10 his testimony. He typically gathers there with a group of  
11 ten or more people and they pray together in unison out loud  
12 so that they can be clearly heard by passersby. That's  
13 Mr. Smith's testimony.

14 Mr. Smith, he has a fairly large Crucifix that he's  
15 mounted to the top of an eight-foot pole and his practice  
16 when he's standing on the edge of the buffer zone praying  
17 out loud so passersby can hear him is he'll hold that tall  
18 pole with the Crucifix way up high where anyone walking by  
19 can see it. That's what he wants to do. That's what the  
20 law allows him to do and that's what he, in fact, does do.

21 Mr. Smith explained that on the second Saturday of  
22 each month, typically a much larger group of people gathers  
23 outside the Boston clinic to pray out loud in public and  
24 Mr. Smith's practice is he brings on those days a loud  
25 speaker with a microphone so that whoever is leading the

1 prayer can use the loud speaker so that their voice can be  
2 heard by the entire group of individuals praying there on  
3 the edge of the buffer zone but also by anybody passing by,  
4 going into the clinic or just going about other business and  
5 walking down the sidewalk next to Commonwealth Avenue.

6 Mr. Smith testified that he has frequently, when  
7 he's there on Saturday mornings, seen anti-abortion  
8 counselors at work on the sidewalk, some holding large signs  
9 which he testified typically attract attention. These signs  
10 are not signs that nobody can see, they actually get a  
11 response from passersby. The response is often quite  
12 negative, especially if a woman is going into the clinic and  
13 is being accompanied by somebody else, a friend, a family  
14 member, some companion.

15 It's not unusual according to Mr. Smith's testimony  
16 for the companion to react very negatively to the signs of  
17 the counselors outside the buffer zone but that only  
18 confirms that the message is being heard. Certainly there  
19 is no First Amendment right to force passersby to have a  
20 positive response or any response. There is only the right  
21 to offer a message so that willing listeners can receive it.  
22 The fact that lots of people react negatively demonstrates  
23 that the message is being communicated.

24 Your Honor, the fourth plaintiff whose activities  
25 are focused at the Boston clinic is Mr. Eric Cadin. He,

1 like, Ms. McCullen and Ms. Zarrella, wants to speak with  
2 pregnant women ideally who are going to the clinic and try  
3 to persuade them not to have an abortion. He too is  
4 successful in striking up conversations on that sidewalk as  
5 he wants to do. His testimony is that most days he's there  
6 at least ten people will actually stop and engage in  
7 conversation with him.

8 Most other people ignore him or make clear that  
9 they don't want to speak with him.

10 **THE COURT:** What about the testimony that I asked  
11 counsel about, where the figures came from, 5 percent, 90  
12 percent, do you know what I am talking about?

13 **MR. SALINGER:** Yes. Your Honor --

14 **THE COURT:** Are you getting to that? Are you going  
15 to cover that?

16 If you are, you can wait to do it but --

17 **MR. SALINGER:** I don't -- I can't really answer the  
18 question of where the 5 or the 90 percent comes from.

19 **THE COURT:** Well, he said it is the testimony of  
20 the deponent, whoever --

21 **MR. SALINGER:** The testimony I have in mind, Your  
22 Honor, is testimony about questions from Mr. DePrimo to  
23 plaintiffs along the lines of how many times have you seen  
24 somebody in the buffer zone and called out to them and they  
25 haven't responded or how many times have you seen people on

1 the other side of the buffer zone and they haven't  
2 responded.

3 Your Honor, if the numbers that Mr. DePrimo was  
4 citing mean anything, we suggest they simply demonstrate  
5 that a lot of people, perhaps the vast majority of people  
6 who are going to the Boston clinic or these other clinics,  
7 simply have no interest in the message that plaintiffs are  
8 offering. That's not indicating that there is some  
9 constitutional problem. That just means that when  
10 plaintiffs share and offer their message, a lot of people  
11 say no, please, don't bother me or have even more negative  
12 reaction.

13 But if I'm right in surmising that the numbers  
14 Mr. DePrimo was talking about were based on estimates about  
15 how many people do not react, that simply shows that people  
16 who can certainly hear and see plaintiffs don't want to have  
17 anything to do with them. That, of course, is the  
18 constitutional right of those patients going to the clinic  
19 or passersby having nothing to do with the clinic, they  
20 don't need to pay attention to plaintiffs' message if they  
21 don't want to.

22 What the Constitution asks is very narrow and  
23 simply that there be adequate channels of communication  
24 available so that plaintiffs can offer their message and  
25 willing listeners who want to stop and talk, who want to

1 come out of the buffer zone or in Worcester or Springfield  
2 want to leave the private property where they parked their  
3 cars and go talk to plaintiffs can do so.

4 But if, in fact, it is the case that most people  
5 who go into the clinic have no interest in having that  
6 communication, that's not showing a constitutional  
7 deficiency. That's simply the reality that apparently most  
8 people encountering many of these plaintiffs don't want to  
9 talk to them and have no interest in their message.

10 **THE COURT:** Okay. Thank you.

11 **MR. SALINGER:** Your Honor, the number that I was  
12 starting to come up with that prompted your question was the  
13 testimony of Mr. Cadin, his experience when he's trying to  
14 strike up conversations on the sidewalk by Comm. Ave.  
15 outside the Boston clinic. His testimony is that most days  
16 he is there at least ten people will, in fact, stop and  
17 converse with him, which is his goal, to have conversations.

18 The vast majority of people walking by are not  
19 interested in that conversation but he's able to have  
20 conversations with the people who care to and want to stop  
21 and talk. Mr. Cadin also testified that most days he's  
22 there and he's offering literature, the kind of literature  
23 that plaintiffs' counsel displayed, most days 20 or 30 women  
24 will take a pamphlet from Mr. Cadin.

25 And so there, too, he wants to offer up literature,

1 he can do so and people who want to take it, his own  
2 testimony confirms those people do take it.

3 Mr. Cadin testified that his ultimate goal  
4 persuading pregnant women not to have an abortion, he  
5 continues to have success at that despite the change in the  
6 buffer zone law back in November of 2007. His own testimony  
7 is that since that time through this work of trying to talk  
8 to people on the sidewalk by Comm. Ave., he's convinced at  
9 least ten women not to have an abortion.

10 And he's also, he testified, convinced at least  
11 five women who had been intending to go to Planned  
12 Parenthood instead to go to A Woman's Concern. So, once  
13 again, what he's trying to do he, in fact, is able to do as  
14 the Act is applied.

15 I mentioned how there is the larger prayer group on  
16 the second Saturday of each month. Mr. Cadin testified that  
17 from time to time he joins that group and engages in a  
18 prayer vigil. And he through his testimony describes the  
19 group praying on the edge of the buffer zone, testified that  
20 he has from time to time seen people as part of that group  
21 holding signs that say things like, "Abortion is murder,"  
22 signs that can be read and are read by people passing by on  
23 the sidewalk.

24 Your Honor, the fifth bit of evidence that we want  
25 to draw your attention to about the Boston clinic comes from

1 Ms. Metzger. She visited the clinic one day, happened to go  
2 on Good Friday in 2010, which I believe was April 2nd. And  
3 on that Good Friday there was quite a large group of people  
4 engaged in prayer around the buffer zone. At least one of  
5 the pictures that you saw earlier, there was a very large  
6 group of people right on the edge of the buffer zone and you  
7 could see in that photo there was a white infant-sized  
8 casket on a stand and there was an eight-foot tall wooden  
9 cross. And there was Mr. Smith with his Crucifix on his  
10 eight-foot tall pole. That was a picture that Ms. Metzger  
11 took on that Good Friday in front of the Boston clinic.

12 And she testified that when she was there she could  
13 easily not only see the prayer group but she could hear what  
14 was being said from well across the other side of the buffer  
15 zone confirming that people who communicate their message in  
16 this fashion can be seen and heard.

17 Ms. Metzger saw quite a few signs that day which  
18 she could easily read as she was walking down the sidewalk  
19 or even standing on the opposite side of the buffer zone  
20 from where the sign was. The signs said things like,  
21 "They're killing babies here," "Abortion exploits women,"  
22 "It's a baby, not a choice," "Pregnant, free help for mother  
23 and baby," and "Love creates, nourishes and protects your  
24 baby's life." All of these messages were ones that  
25 Ms. Metzger could easily and did see and she documented them



1 in photos which are part of the record evidence that has  
2 been filed with the Court.

3 Ms. Metzger testified when she was deposed by  
4 Mr. DePrimo that as she was walking down the sidewalk that  
5 Good Friday morning, several women who she quickly figured  
6 out were there to try to engage in anti-abortion counseling  
7 called out to her. They said, "Your baby has a heart beat"  
8 And, "Abortion is forever."

9 Now, Mr. DePrimo showed you and described to you in  
10 some detail Ms. Metzger's observations about some of those  
11 same sidewalk counselors stopping a woman and having a  
12 30-minute long conversation with that woman on the sidewalk  
13 on the other side of Alcorn Street right in front of the  
14 Star Market. You saw the picture taken by Ms. Metzger. And  
15 Ms. Metzger observed all of this begin to happen, observed  
16 it happen.

17 Ms. Metzger happened to be up on the roof of the  
18 clinic building taking a few photos about 30 minutes later  
19 when she saw two of the women counselors and the woman being  
20 counseled cross the street together, get in a car and drive  
21 away.

22 And I repeat all of that because I really want to  
23 underscore what Mr. DePrimo said in describing all that  
24 observation. He said, and I quote, "This is how pro-life  
25 counselors effectively communicate."

1 Well, Ms. Metzger was able the one day she visited  
2 to observe pro-life counselors, in plaintiff's words,  
3 "effectively communicate," notwithstanding the buffer zone.  
4 And as I described, Ms. McCullen, Ms. Zarrella and Mr. Cadin  
5 who are trying to do similar kinds of communications can and  
6 do have those kinds of conversations there on the sidewalk  
7 outside the buffer zone. And so there are ample alternative  
8 channels available in Boston.

9 Turning to the Worcester clinic, Your Honor,  
10 Mr. DePrimo is right to emphasize that the Worcester clinic  
11 has only been in this location since December of 2009 so  
12 whatever happened somewhere else has nothing to do with how  
13 the law is being applied in Worcester today. We're really  
14 dealing with the past year and a half or so.

15 As you heard, most patients, unlike in Boston where  
16 most patients walk down the sidewalk, in Worcester those  
17 patients drive to that clinic. And you saw various photos  
18 with the building with the Planned Parenthood label on top  
19 and saw how people drive down Dewey Street, turn into the  
20 driveway, there's sort of an L-shaped parking area and  
21 that's where they park.

22 I emphasize all of that because, to state the  
23 obvious, but the record confirms this, all of that is  
24 private property. And so the inability of plaintiffs to go  
25 up to women as they're parking their cars, as they're

1 getting out of their parked car, as they're walking from the  
2 parked car to the front door has nothing to do with the  
3 buffer zone statute. If there was no buffer zone,  
4 plaintiffs still could not approach patients going to the  
5 Worcester clinic who parked their car because that's all on  
6 private property. And so any complaints by plaintiffs that,  
7 well, we can't go right up to those women, it's a function  
8 of how the property there is configured and the fact that  
9 most patients drive to get there.

10 Nonetheless, the testimony of Mr. Bashour and  
11 Ms. Clark and some confirming testimony of Ms. Metzger  
12 demonstrates that in Worcester as well plaintiffs can and do  
13 share their message and willing listeners engage with them  
14 whereas unwilling listeners ignore them.

15 Mr. Bashour's practice according to his testimony  
16 is to stand on the Pleasant Street side of the clinic, he  
17 prefers to stand on the sidewalk on the same side of the  
18 street as the clinic building, right on the edge of the  
19 buffer zone. His testimony was he stands in that spot  
20 because then even women who are coming from the parking area  
21 which is behind the clinic building relative to Pleasant  
22 Street up to the clinic door can see him through that metal  
23 fence so he positions himself where he can see them and they  
24 can see him. And his practice is from that position to call  
25 out offers of help.

1           Ms. Metzger who visited the Worcester clinic on two  
2           different occasions, once in September of 2010 and then one  
3           more time in July of 2011, both times she ended up parking  
4           behind, because that's what Mr. Bashour was describing,  
5           walking from her car to the building door and she could hear  
6           people calling out to her from Pleasant Street in the  
7           general area where Mr. Bashour stands. So the evidence  
8           confirms that when Mr. Bashour calls out with offers of  
9           help, he can be heard.

10           Any person who wanted to come out and speak with  
11           him could do so. He testifies that that basically never  
12           happens; but, again, nobody has to talk to Mr. Bashour.  
13           That's their constitutional right.

14           Now, Mr. Bashour said, you know, some people  
15           approached the clinic on foot and typically they will go in  
16           through that entrance gap through the metal fences that you  
17           saw in the pictures. And when people walk by him, he tries  
18           to make offers of help.

19           Mr. Bashour testified that women who pass by him on  
20           the sidewalk, it's clear that they hear his offer but they  
21           almost always make it clear to him that they have no  
22           interest in talking to him. So he is able to convey his  
23           message but the listeners are not interested. That's their  
24           right. It does not demonstrate a violation of the First  
25           Amendment.

1           Nonetheless, Mr. Bashour testified that since  
2           Planned Parenthood moved its Worcester clinic to this  
3           location in December of 2009, through his work from the  
4           sidewalk next to Pleasant Street he has helped to convince  
5           five or six women not to have an abortion. Further evidence  
6           that he is, in fact, able to share his message and have the  
7           kinds of communications that he says he is looking for.

8           Mr. Bashour testified that when he's outside the  
9           clinic, he offers literature. Some people do take it. Most  
10          refuse to. But he is able to and does attempt to  
11          communicate in that way.

12          Mr. Bashour when he is there, he has seen other  
13          protestors or counselors who are present holding  
14          anti-abortion signs that he can read. And he has noticed  
15          that those signs typically elicit reactions from passersby.  
16          Sometimes positive reactions, sometimes quite negative  
17          reactions, but the signs are, indeed, an effective way to  
18          communicate. People see them and they respond to them.

19          And Mr. Bashour also testified that on various  
20          occasions he has seen and heard large groups of people  
21          standing outside the buffer zone near the Worcester clinic  
22          praying out loud in a way that passersby can hear them.

23          Plaintiff Nancy Clark is also interested in  
24          speaking with women outside the Worcester clinic. Her  
25          practice is also to stand on Pleasant Street but she prefers

1 to stand instead of where Mr. Bashour does on the side of  
2 the street next to the clinic building, she likes to stand  
3 across the street. And her practice is to call out offers  
4 of help.

5 Now, Mr. DePrimo correctly pointed in his closing  
6 argument to Ms. Clark's testimony that only about one  
7 percent of the women she calls out to will cross the street  
8 and come talk to her. Your Honor, we think that that fact  
9 has significance that Mr. DePrimo is not acknowledging. It  
10 shows that women who hear Ms. Clark calling out hear her  
11 message and, in fact, want to talk to her will do so.  
12 Perhaps 99 percent of the women who hear the offer of help  
13 aren't interested, they don't want help from Ms. Clark. But  
14 people who hear her and want to engage in conversation with  
15 her, not only are they free to do so but Ms. Clark's  
16 testimony confirms that, in fact, they do do so.

17 Ms. Clark testified that since December of 2009 she  
18 has convinced at least four women who were heading to the  
19 Planned Parenthood clinic instead to go across the street to  
20 the Problem Pregnancy organization. Ms. Clark also  
21 testified that sometimes, not always but sometimes she'll  
22 hold a sign and she gets lot of reactions, typically very  
23 negative. Again, she's communicating a message. She's just  
24 not getting the reaction that she wants.

25 But Ms. Clark at her deposition recalled a time

1 where she was standing across the street from a clinic with  
2 her sign and a young woman who had been inside the clinic  
3 building came out, crossed the street to where Ms. Clark was  
4 standing and asked about the sign, asked why Ms. Clark was  
5 holding the sign and got into a conversation with Ms. Clark.

6 And according to Ms. Clark's testimony, as a result  
7 of that conversation, the young woman decided not to return  
8 to the Planned Parenthood clinic. So further confirmation  
9 from Ms. Clark herself that she can convey her message and  
10 that listeners who want to respond positively can and will  
11 do so.

12 Ms. Clark testified that she can and does hand out  
13 literature on the sidewalk and she, like Mr. Bashour, has  
14 seen large groups pray out loud outside that buffer zone in  
15 a way that anyone passing by can hear.

16 Both Mr. Bashour and Ms. Clark gave testimony of  
17 seeing a gentleman who typically goes to the Worcester  
18 clinic Thursday mornings, he dresses up as death or the Grim  
19 Reaper. He's got a long-handled scythe, maybe six or seven  
20 feet. There are photos in the record. You will be able to  
21 see them yourself, Your Honor. He wears a black cloak, a  
22 hood and a cloak that goes down to ground level. He has  
23 what appear to be white gloves and a white face.

24 And Ms. Bashour, I'm sorry, Ms. Clark and  
25 Mr. Bashour, in their declarations, they take pains to

1 distinguish what, the message they're trying to communicate  
2 from what they believe the figure of death, the Grim Reaper  
3 is trying to communicate. And they say that they think that  
4 gentleman is trying to communicate a message of, to use  
5 their words, "death and judgment," and that's not what  
6 they're trying to communicate.

7 But, Your Honor, what this evidence shows is that  
8 this someone like the Grim Reaper character who wants to  
9 convey a message of death and judgment outside the Worcester  
10 clinic is able to do so notwithstanding the buffer zone  
11 legislation being applied and he's able to do it quite  
12 effectively from just his presence there.

13 I mentioned two visits by Ms. Metzger confirming  
14 that these messages can be seen and heard so a little bit  
15 more detail about those.

16 The first visit in September of 2010, that was the  
17 first time Ms. Metzger had been to the clinic. And when she  
18 turned onto Dewey Street, she wasn't quite sure where the  
19 entrance to the clinic parking lot, where that driveway was.  
20 You might recall from the photos immediately on the corner  
21 of Pleasant and Dewey Street there is another property.  
22 There is a little parking area there. That's not the  
23 Planned Parenthood clinic property. The clinic building is  
24 adjacent going up Pleasant street to that building and the  
25 driveway is just past that property.



1 Well, that day Ms. Metzger paused in her car to try  
2 to figure out where she was supposed to turn and immediately  
3 two women approached the car, one on each side, offering  
4 literature and offering help and they thrust four different  
5 kinds of pamphlets through the windows of Ms. Metzger's car.  
6 Those pamphlets are in evidence along with Ms. Metzger's  
7 testimony explaining them.

8 Ms. Metzger then drove on in through that driveway  
9 that you saw the pictures of and she parked in that private  
10 parking area and walked from there to the actual door of the  
11 building. And as she did so, she could hear women calling  
12 to her from the Pleasant Street side, from the other side of  
13 those metal fences, calling out to her, "We love you,"  
14 "Please come talk to us," and, "There are other options."  
15 And Ms. Metzger testified to all of that.

16 Ms. Metzger returned one other time to the  
17 Worcester clinic July of this year. She happened to see the  
18 Grim Reaper figure that day. That's why there are photos in  
19 the record. She saw protestors holding signs outside both  
20 the Pleasant Street and the Dewey Street buffer zones which  
21 she could easily read not only as she was coming down the  
22 street but she could read one of the signs which said, "God  
23 loves you, Mom and Dad" when she was in the parking lot near  
24 Dewey Street there because the person holding the sign was  
25 directly across the road. The other sign she saw read,

1 "Abortion is a bad sin."

2 That day after she parked, she could see the signs  
3 from the parking lot. She also testified that she could  
4 hear protestors calling out to her while she was in the  
5 parking lot. She then went into the clinic building and  
6 when she left a little while later that day and she was  
7 still on the private property but just coming out the door,  
8 she could hear a woman yelling from across the street where  
9 Clark stands and, indeed, it may have been Ms. Clark because  
10 we saw a photo earlier of that scene. Mr. DePrimo said that  
11 one of the three women standing there was Ms. Clark.

12 But my point is that Ms. Metzger as she came out  
13 the door could hear a woman calling from across Pleasant  
14 street saying, "Anything you need, we can help you, come  
15 across the street." So this confirms that when someone  
16 stands where Ms. Clark prefers to and calls out the sorts of  
17 things that she does, people who are going into or coming  
18 out of the actual clinic building can hear that and if they  
19 wish to follow up on the offer of help or information, they  
20 easily can go across the street.

21 Ms. Clark's testimony, as we discussed, is perhaps  
22 one percent of the people actually do that, which, you know,  
23 there are some fields, telemarketing and others that would  
24 think a one percent response rate is quite positive.

25 But the point for the narrow question before the

1 Court is that notwithstanding application of the buffer zone  
2 statute at the Worcester clinic, plaintiffs and others can  
3 and do successfully share their message in a way that it can  
4 be heard by willing listeners who are going to or leaving  
5 the Worcester clinic.

6 The Springfield clinic --

7 **THE COURT:** What about the percentage of people who  
8 are unable to get the message? I mean, is that interwoven  
9 in this case somehow?

10 **MR. SALINGER:** Well, actually, Your Honor, there is  
11 no evidence that people are unable to get the message. I  
12 think what you have in mind is Mr. DePrimo arguing, well,  
13 nobody ever comes out of the parking lot to talk to  
14 Mr. Bashour and only one percent of women who are called out  
15 to by Ms. Clark are willing to cross the street to talk to  
16 her. Well, that doesn't mean they haven't gotten the  
17 message. That means that almost all of the women who get  
18 the message are not interested in having further  
19 communication.

20 Ms. Metzger's testimony, what she could see and  
21 what she could hear from the parking lot and as she walked  
22 from the parking lot to the door of the building, what she  
23 could see and hear as she was leaving the building confirms  
24 that the messages that are being called out are received.

25 The fact that most people don't respond in a way

1 that plaintiffs want to respond to them doesn't demonstrate  
2 any sort of constitutional violation because, of course,  
3 plaintiffs don't have a constitutional right to compel  
4 everybody going to or leaving the clinic, in fact, to pay  
5 attention to them. They don't have a right to compel people  
6 to come to them and have a conversation from a few feet  
7 away. They do have the --

8 **THE COURT:** I understand that argument but there is  
9 a legitimate position that you are not supposed to draw  
10 those boundaries to reduce the opportunities for success of  
11 the plaintiffs. Isn't that a fair --

12 **MR. SALINGER:** The -- well, let me answer in terms  
13 of the facts, Your Honor, since I think that's perhaps what  
14 would be most useful.

15 The fact is that on the Pleasant Street side,  
16 whether there is a buffer zone there or not, after one, a  
17 pedestrian goes from Pleasant Street and walks through that  
18 entranceway in the fence up to the clinic door, that's all  
19 private property where, whether there is a buffer zone or  
20 not, plaintiffs can't go to.

21 The fact that most patients who drive there, and  
22 most of them do, come off of Dewey Street and then park in a  
23 place in a private parking area that is behind buildings  
24 and, thus, there is not a direct line of sight either from  
25 Dewey Street or from Pleasant Street, that's not a creation

1 of the statute. That's not some unconstitutional state  
2 action. That just happens to be the layout of private  
3 property. That also would be true whether the buffer zone  
4 statute existed or not.

5 And, similarly, Mr. DePrimo was depicting some  
6 calculations that measured a straight line distance if you  
7 were on the edge of the driveway on Dewey Street and you  
8 were trying to figure out how far away the furthest parking  
9 spot was, I think he had calculated that to be something  
10 like 325 feet. But, again, that's not caused by the buffer  
11 zone statute. That's just the layout of this private  
12 property that with the buffer zone statute or without the  
13 buffer zone statute plaintiffs would not be allowed to go  
14 into that parking lot.

15 So all that the buffer zone does in Worcester is,  
16 around the driveway, it makes sure that the driveway is free  
17 and clear and people who want to keep going can do so.  
18 Ms. Metzger testified, and she's got some photos, that, you  
19 know, if somebody chooses, as some protestors do, to stand  
20 on the edge of the buffer zone sort of opposite the driveway  
21 entrance or just as one who is driving down Dewey Street and  
22 a patient is slowing down to make that turn to the driveway,  
23 the passenger side door is just a few feet away from  
24 somebody standing on the sidewalk outside the buffer zone.

25 And so if there was a willing listener who saw

1 somebody and said, oh, I'm really interested, here's  
2 somebody who is offering help, I want to stop and talk to  
3 them, they could stop. They could put down their window and  
4 accept literature. They could pull over and have a  
5 conversation.

6 All that plaintiffs have shown is that the vast  
7 majority of people going to the clinic, they're going to the  
8 clinic for some sort of medical service. It's usually not  
9 abortions. Sometimes it is an abortion procedure. But  
10 they're not interested in accepting offers of help from  
11 plaintiffs or others. And so the buffer zone statute is not  
12 interfering with the conveyance of a message and the mere  
13 fact that a lot of people don't want to hear the message,  
14 that's their choice but it has nothing to do with the buffer  
15 zone.

16 **THE COURT:** Okay. Go ahead. Thank you.

17 **MR. SALINGER:** So turning to the Springfield  
18 clinic, if I may.

19 First, let me clarify, I'm not sure it actually  
20 matters for the case but in terms of the number of buffer  
21 zones, remember that the Act itself does not automatically  
22 bar anybody from going anywhere.

23 But what the statute now provides is that it's  
24 permissible to have a buffer zone around a driveway or a  
25 clinic entrance or exit but in order for the limitations of

1 the Act to take effect, the buffer zone needs two things.  
2 It has to be clearly marked, you know, like one of these  
3 painted arcs, and it has to be posted so people know what  
4 that means.

5 And the parties have stipulated that although there  
6 are arcs, some fresh, three of them not so fresh, drawn or  
7 marked in some way around all five of these entrances, only  
8 at two of the entrances are they posted so we're only  
9 talking about two buffer zones under the Act.

10 Of course, to state the obvious, we're dealing with  
11 an as applied challenge. Well, the Act as applied in  
12 Springfield right now, there may be arcs drawn around the  
13 other three but if they're not posted, then they do not  
14 constitute buffer zones under the statute.

15 None of the plaintiffs have been arrested or  
16 proclaimed that a police officer has ever even spoken to  
17 them and asked them to leave an area under the new buffer  
18 zone.

19 But just to clarify, in Springfield we're talking  
20 about two clearly marked and posted buffer zones. One is on  
21 Main Street. There are three driveway entrances and I  
22 believe the middle one has a clearly marked and posted  
23 buffer zone and on Wason Avenue the second driveway in as  
24 you're driving from Main Street. And that's the entrance  
25 that the record shows us, that's the entrance that clinic

1 patients will typically use because that's the closest  
2 entrance to the building that houses the Springfield clinic.

3 The distance the record shows between the front  
4 door of that building and the public sidewalk of Wason  
5 Avenue is just over 200 feet. And so even more so than at  
6 the Worcester clinic, a lot of what you heard this morning  
7 from the plaintiffs about the Springfield clinic is, well,  
8 there is no way to approach people as they get out of their  
9 cars and go to the door. There is no way to be sure who is  
10 going to the clinic. None of that is a result of the Act.  
11 It's a result of the fact that this is all private property  
12 and there are fairly expansive parking lots that separate  
13 the public roadway from the building where the clinic is  
14 located. But those facts cannot make the statute as applied  
15 unconstitutional. That's simply the fact that private  
16 property is private property.

17 There is one plaintiff, Dr. Shea, who is interested  
18 in communicating around the Springfield clinic and his  
19 testimony is that what he wants to do is wear a sign, you  
20 saw photos, the sign on a rope around his neck that says,  
21 "They're killing babies here." And according to Dr. Shea's  
22 later declaration he wears that sign in the hope that it  
23 will encourage people going to the clinic to stop and have  
24 conversations with him and seek help from him.

25 There is no doubt that Mister -- I'm sorry --



1 Dr. Shea effectively communicates with his sign. His own  
2 testimony is that many people react to his sign,  
3 occasionally positively. Many times he gets negative  
4 reactions but he's able to have that communication.

5 Dr. Shea, of course, is not the only anti-abortion  
6 protestor or counselor who spends time outside the  
7 Springfield clinic. Dr. Shea sees others and his own  
8 testimony, he estimates that as much as 5 percent of the  
9 time people who come off of Wason Ave. or parking outside  
10 the clinic will come out and talk to somebody on the  
11 sidewalk who is holding a sign offering help.

12 Now, as you heard, Dr. Shea testified that nobody  
13 comes and talks to him. We don't know. Maybe that's a  
14 function of the fact that he's chosen to wear a sign that  
15 says, "They're killing babies here," the sort of thing that  
16 Mr. Bashour and Ms. Clark says is a message of death and  
17 judgment rather than a message of help and counseling.  
18 Maybe others who have signs offering help and counseling are  
19 more likely to convince people who want to converse with  
20 them to leave the parking lot and do so.

21 But Dr. Shea and others have those opportunities  
22 and the buffer zone is not interfering with them.

23 Ms. Metzger visited the buffer zone or visited the  
24 Springfield clinic once and when she did, she saw a number  
25 of protestors right on the edge of the buffer zone near that

1 Wason Avenue entrance. She noted a sign that said, for  
2 example, "Abortion hurts women. Choose life." She saw  
3 somebody else holding a large picture of the Virgin Mary and  
4 these people were waving to people driving by. And so that  
5 also confirms that somebody who is going to the clinic as  
6 Ms. Metzger was can, in fact, as they're driving by see and  
7 read these signs.

8 Now, Mr. DePrimo on behalf of Dr. Shea articulated  
9 a concern that sometimes what Dr. Shea wants to do, instead  
10 of standing near the place where he knows clinic patients  
11 are most likely to go, what he wants to do is walk down the  
12 sidewalk and he can't walk through the buffer zone while  
13 displaying his sign.

14 Well, although that may be true, of course he could  
15 choose to walk through the buffer zone to get to the other  
16 side, the clear exemption for that. Not only that --

17 **THE COURT:** With the sign?

18 **MR. SALINGER:** All he would have to do is turn the  
19 sign around so it's facing him rather than --

20 **THE COURT:** Okay.

21 **MR. SALINGER:** And if he wants to do that, he can.  
22 If he doesn't want to, he doesn't have to.

23 So to summarize our affirmative case before making  
24 a few quick rebuttal points, Your Honor --

25 **THE COURT:** Are you going to talk about the

1 multitask building that is there?

2 **MR. SALINGER:** Well --

3 **THE COURT:** And what the practical as well as  
4 constitutional implications might be?

5 **MR. SALINGER:** Your Honor, I'm struggling a little  
6 bit because this is a new argument that we hadn't heard  
7 before today. But I wasn't hearing any constitutional  
8 import. Of course, the one claim left is a constitutional  
9 claim --

10 **THE COURT:** I thought he cited a case where they  
11 said that a multitask building is suspect.

12 **MR. SALINGER:** He cited a recent Ninth Circuit case  
13 that he mostly cited for reasons that disagreed with First  
14 Circuit precedent. That's a different issue which I'll turn  
15 to in a moment, if I may.

16 We're going to go back and reread this new Hoye  
17 case in the Ninth Circuit. And if I can better answer Your  
18 Honor's question with a short written submission, I will do  
19 so.

20 But my main point I think in response, Your Honor,  
21 is the difficulty that Dr. Shea or anybody else would have  
22 in being able to tell who was a clinic patient or visitor as  
23 opposed to somebody going to visit some other business in  
24 the building wouldn't be any different if there was no  
25 buffer zone there.

1           If Dr. Shea stood right next to the driveway, as he  
2       says that he wants to, he still would have no idea who of  
3       the many people driving by him and parking on private  
4       property and going into a private building is going to the  
5       clinic versus not going to the clinic. So it's hard to see  
6       given the factual circumstances at issue here where  
7       Dr. Shea's testimony and Ms. Metzger's testimony makes clear  
8       that he has the ability to convey a message either to people  
9       driving by or to people in the parking lot from the public  
10      sidewalk outside the buffer zone.

11           **THE COURT:** You are saying he just can't know who  
12      his audience is.

13           **MR. SALINGER:** That's right. That would be true  
14      with or without the buffer zone. That wouldn't be changed  
15      by the buffer zone.

16           **THE COURT:** All right.

17           **MR. SALINGER:** But we will reread the Ninth  
18      Circuit's decision and if we could provide more help for  
19      legal guidance, we'll do so promptly.

20           **THE COURT:** We will welcome it, thank you.

21           **MR. SALINGER:** Your Honor, as I tried to make clear  
22      in this summary, each of the plaintiffs, their own testimony  
23      confirms that the kind of communications, the kind of  
24      message they want to offer, they can offer them, they do  
25      offer them. The messages are heard outside the clinics and

1 people who happen to be passing by or people going to the  
2 clinic or leaving the clinic who want to follow-up and  
3 engage with the plaintiffs, not only can they do so, as Your  
4 Honor found during the first phase of this case, you made  
5 findings that the Buffer Zones Act is constitutional on its  
6 face because there were all these opportunities to  
7 communicate.

8 But, in fact, the record evidence demonstrates that  
9 those communications happen where there is a willing  
10 listener. They don't happen where the passerby or the  
11 person going to the clinic hears the offer of help or sees  
12 the sign and wants to have nothing to do with it. That's  
13 not some unconstitutional result of the Act. That instead  
14 reflects the listener's constitutional right to turn away  
15 from the message and say, no, please leave me alone, I'm not  
16 interested.

17 Your Honor, I'm going to shift, if I may, to a few,  
18 what I call rebuttal points. A lot of plaintiffs'  
19 affirmative case that was, as it was presented this morning  
20 is about the extent to which the buffer zone statute  
21 constrains the time or place in which plaintiffs can offer  
22 their message.

23 First of all, Your Honor, that, of course, is true  
24 of any time, place or manner restriction. If there were a  
25 law that didn't restrict speech at all, the First Amendment

1 would never be implicated and we wouldn't be here. The mere  
2 fact that a time, place or manner restriction restricts  
3 speech doesn't make it unconstitutional.

4 The one remaining issue, since it's already been  
5 decided by this Court and then on appeal by the First  
6 Circuit that the statute is content neutral and that it  
7 serves a substantial governmental interest in enhancing  
8 public safety, Your Honor ruled in December the one  
9 remaining question is the adequacy of alternative avenues of  
10 communication. And so I just want to underscore again the  
11 reference I started with to this First Circuit decision  
12 Sullivan versus Augusta which in turn cites quite a number  
13 of earlier decisions.

14 Sullivan is a 2007 decision. And the court  
15 emphasized there that the question on this prong of  
16 intermediate scrutiny for a time, place and manner  
17 restriction, the question is whether the remaining avenues  
18 of communication are adequate, not "whether a degree of  
19 curtailment of speech exists."

20 Plaintiffs, their case is about the second part,  
21 the thing that the First Circuit says is irrelevant. They  
22 say, well, there are ways in which the buffer zone statute  
23 as applied curtails our speech because what we really want  
24 to do is everything we're doing now but we want to do it  
25 standing right next to the clinic entrance or right next to

1 the driveway or right next to the spot in Worcester where  
2 the walkway leaves the public sidewalk.

3 Your Honor, that's not an as applied challenge.  
4 That's the issue that the Court already decided and the  
5 First Circuit already decided in terms of the facial  
6 challenge. There is no constitutional right for the  
7 plaintiffs to stand there, at least where, as in this case,  
8 standing outside the buffer zone still enables them to offer  
9 up their message in a way that it can be heard by people and  
10 willing listeners can respond to it.

11 I know you're familiar not only with this case but  
12 with the prior buffer zone cases. I do want to just correct  
13 a point that was made by plaintiffs' counsel about the  
14 Madsen case. Mr. DePrimo was wanting to draw the Court's  
15 attention to the total length of buffer zones drawn on the  
16 ground at the Boston, Worcester or Springfield clinics, how  
17 long they were and he kept contrasting it with the Supreme  
18 Court's Madsen decision where he said there the court only  
19 approved a 36-foot buffer zone.

20 But, Your Honor, the 36-foot buffer zone in that  
21 case, unlike here where the buffer zone just gets drawn  
22 around a driveway or an entrance, there the 36 feet was  
23 around the entire property line. And so if in Madsen one  
24 had done what Mr. DePrimo is asking the Court to do in this  
25 case and measure the buffer zone from one end all the way to

1 other, it would have been many hundreds of feet. That was a  
2 much larger buffer zone than what's at issue in this case.  
3 And it was upheld by the United States Supreme Court.

4 But there is a non-buffer zone case that I wanted  
5 to draw the Court's attention to. And this is Heffron  
6 versus International Society for Krishna Consciousness case,  
7 a 1981 decision by the United States Supreme Court. And it  
8 had to do with the Minnesota State Fairgrounds. The ISKCON,  
9 the Krishna Group, what they wanted to do at the fair was to  
10 sell literature. And the fair rules said, well, you can  
11 only offer things for sale if you buy a booth and you make a  
12 sale from a fixed location.

13 The case went up on First Amendment grounds to the  
14 First Circuit and the First Circuit held that as applied  
15 this was not an unconstitutional restraint of speech even  
16 though what the plaintiffs wanted to do was go anywhere on  
17 the fairgrounds and offer literature for sale and they could  
18 not do that. The court said, that's okay, they had adequate  
19 and ample alternative channels of communication. They could  
20 sell literature from a booth on the fairgrounds. They could  
21 sell literature outside the fairgrounds to people going to  
22 or leaving the fair, or they could go anywhere they wanted  
23 on the fairgrounds, talk to people and try to convince them  
24 to come to the booth to buy literature.

25 Plaintiffs said, well, we don't want to do those



1 things. We want to walk around the fairgrounds selling  
2 literature. And the Supreme Court held just because you  
3 can't communicate in a precise way and a precise location  
4 that you want to, that does not make a time, place or manner  
5 restriction unconstitutional where you have adequate  
6 alternative ways to communicate.

7 And the evidence confirms that in this case  
8 plaintiffs had adequate alternative ways to communicate.

9 A second rebuttal point, Your Honor. The  
10 plaintiffs again today were talking about their desire to  
11 interact from a normal conversational distance. This  
12 probably sounds familiar to Your Honor because you dealt  
13 with it during the facial challenge. You held and then the  
14 First Circuit held that there is no First Amendment right to  
15 position yourselves so that everybody going to a clinic has  
16 to pass within a few feet of you so that you can guarantee  
17 that everybody at least for a moment is within a normal  
18 conversational distance.

19 But, furthermore, the evidence in this case, as  
20 I've summarized for Your Honor, shows that there is nothing  
21 about the Act as applied that bars plaintiffs from  
22 interacting with willing listeners, and often with unwilling  
23 listeners in Boston, from just a few feet away. And anybody  
24 who wants to in Boston stop on the sidewalk and have a  
25 conversation or in Worcester or Springfield, anybody who has

1 parked on private property who wants to go out and have a  
2 conversation from a few feet away can do so and plaintiffs'  
3 own testimony indicates from time to time people do do so.

4 What plaintiffs cannot do, however, and Your Honor  
5 made this ruling in December, plaintiffs can't retry or  
6 reargue the findings that this Court and the First Circuit  
7 has already made in this case with respect to there being no  
8 absolute right to position oneself from a normal  
9 conversational distance and force even people who really  
10 have no interest in talking to you to pass very close to you  
11 as they're trying to get into a clinic entrance.

12 The third point, Your Honor, I've touched on a few  
13 times but I just want to highlight it as a rebuttal point,  
14 the distinction I keep making that the law makes between  
15 willing and unwilling listeners. The Supreme Court has said  
16 over and over that the First Amendment gives the listener  
17 the right and some burden to pay no attention if they don't  
18 want to hear the message.

19 Many of the practical complaints articulated this  
20 morning by the plaintiffs really are nothing more than  
21 people who hear offers of help, don't want to hear anything  
22 else, don't want anything to do with the plaintiffs.

23 Unwilling listeners, Your Honor, are free to do that. And  
24 the dismay by the plaintiffs that there are just a lot of  
25 people who are going to these clinics who don't want to hear

1 the message, the help, the anti-abortion message that  
2 plaintiffs and others are offering does not demonstrate a  
3 First Amendment violation.

4 Fourth rebuttal point, Your Honor, and I have seven  
5 in total in case you're wondering how long I'm going to go  
6 on. We're halfway there on the rebuttal points.

7 Mr. DePrimo brought the Court's attention to  
8 concerns that if one stands in the middle of the street, on  
9 Alcorn Street, that could be unsafe because there is traffic  
10 moving by. And he showed some pictures of pedestrians  
11 crossing over and cars stopped waiting for them to cross.

12 Your Honor, the Act as applied doesn't require or  
13 force anybody to stand in the middle of moving traffic.  
14 Plaintiffs are smart and reasonable people and have the  
15 common sense to know that one should stand on the sidewalk  
16 if you're trying to converse with people going by. And the  
17 Boston clinic where this is really, this complaint is really  
18 focused on, as I explained earlier, there is plenty of space  
19 that plaintiffs can and do use in safety on the sidewalk to  
20 converse.

21 If they are positioning themselves in the middle of  
22 Alcorn Street, that side street next to the Boston clinic,  
23 that's not something they're being forced to do by the Act.  
24 Perhaps what plaintiffs are implicitly trying to do is  
25 reargue a different finding that this Court and the First

1 Circuit has already made and that's the finding that the Act  
2 serves the substantial interest in enhancing public safety.  
3 Perhaps they're trying to say, no, the Act as applied  
4 doesn't increase public safety, it makes things less safe  
5 because it's telling us to go stand in the middle of moving  
6 traffic.

7 Well, they can't as a matter of law retry that  
8 point and factually the assertion that the Act is forcing  
9 them to go stand in traffic is just wrong.

10 Fifth rebuttal point, Your Honor, and this has to  
11 do with the supposed behavior or misbehavior of the Planned  
12 Parenthood escorts outside the Boston clinic on Saturday  
13 mornings.

14 I say Saturday mornings because the record  
15 indicates that's when the escorts were there. They're there  
16 because, as I mentioned, Saturdays is the day that attracts  
17 large numbers of protestors to the sidewalk outside the  
18 clinic.

19 Your Honor, Ms. Zarrella, the testimony that she's  
20 given in this case is very similar, in some respects it's  
21 word for word identical to testimony she gave in a prior  
22 case already decided by the First Circuit, the McGuire case  
23 where she's also a plaintiff.

24 And here's the point where I said that Ninth  
25 Circuit case Hoye based on Mr. DePrimo's reading of it is

1 inconsistent with First Circuit precedent. Mr. DePrimo as I  
2 understood it said Hoye stands for the proposition that if a  
3 clinic escort is somehow misbehaving, then that constitutes  
4 action of the state that can violate the First Amendment.

5 Well, the First Circuit rejected that position in  
6 McGuire II. I thought Mr. DePrimo said McGuire was only  
7 dealing with the prior version of this Act on its face and  
8 not as applied. If that's what I heard, that's incorrect.

9 McGuire I, the first decision by the First Circuit,  
10 was only a facial challenge. McGuire II was a reprise of  
11 the facial challenge and also dealing with the Act as  
12 applied.

13 And the court explained in some detail and  
14 eloquently why the concerns raised by Ms. Zarrella there and  
15 raised again in this case by Ms. Zarrella don't demonstrate  
16 that the Act as applied is unconstitutional.

17 The First Circuit said that what was being  
18 described sounded like private jousting between private  
19 parties but that that's not state action. And even if  
20 clinic escorts are misbehaving, as a matter of law that does  
21 not demonstrate, cannot demonstrate that the government is  
22 violating the First Amendment.

23 Your Honor, furthermore, this Court has already  
24 ruled in the first phase of this case that on its face the  
25 buffer zone statute does not permit advocacy of any kind in

1 the zone. This Court ruled that the exemption that allows  
2 employees to remain within the zone does not allow the  
3 clinic escorts with pro-choice viewpoints to express their  
4 views in the zone.

5 If there were escorts who were doing that in  
6 violation of the Act, going back to the First Circuit's  
7 ruling in McGuire II, the First Circuit held a violation of  
8 the Act by a private party can't make the statute  
9 unconstitutional. And that's really just, plaintiffs are  
10 trying to retry and reargue the point that at least one of  
11 them, Ms. Zarrella, already tried and lost in the McGuire  
12 case.

13 There is no longer any claim of viewpoint  
14 discrimination in this case. Your Honor, back in December  
15 you granted the defendants' motion for judgment on the  
16 pleadings on Counts 2 through 8 and one of those claims was  
17 the claim that the exemption for clinic employees as applied  
18 constitutes impermissible viewpoint discrimination. That  
19 claim is already out of the case because Your Honor ruled  
20 the allegations in the complaint that there was misbehavior  
21 by clinic escorts couldn't demonstrate viewpoint  
22 discrimination given the ruling in McGuire II in the absence  
23 of an allegation that police were, had -- knowing about this  
24 and were selectively enforcing the law preventing plaintiffs  
25 from engaging in advocacy within the zone but allowing,

1 knowingly allowing the escorts to do so.

2 Your Honor, the evidence that has been presented by  
3 the plaintiffs on this point is no different, no more robust  
4 than the allegations that Your Honor has already determined  
5 failed as a matter of law, although Mr. Cadin and  
6 Ms. Zarrella each recalled, to use their wording, Occasions  
7 where a police officer was present but did nothing, close  
8 quote.

9 There is no evidence in the record that either of  
10 them ever complained to police, that police were ever aware  
11 of any unlawful advocacy by escorts within the zone or that  
12 police knowingly were allowing behavior by clinic escorts  
13 that they were forbidding by plaintiffs or other  
14 anti-abortion counselors or protestors.

15 So exactly like in McGuire II and exactly like this  
16 Court's ruling in this case in granting the motion for  
17 judgment on the pleadings on this claim, all of this  
18 evidence of what clinic escorts may or may not be doing does  
19 not establish a claim of viewpoint discrimination and it's  
20 irrelevant to the one issue that's left in the case which is  
21 the adequacy of alternative channels of communication.

22 If there were, as Mr. DePrimo tried to suggest,  
23 some interference by private individuals, like clinic  
24 escorts, the First Circuit has already held in McGuire II  
25 that can't establish that the statute, either on its face or

1 as applied, is unconstitutional.

2 Your Honor, my last two rebuttal points I think are  
3 each quite short. One has to do with the fact that it snows  
4 in Massachusetts. You saw pictures about piles of snow near  
5 the Worcester and Springfield clinics this winter. There  
6 was a lot of snow this winter. There was a lot of snow  
7 everywhere. There was snow inside the buffer zone. There  
8 was snow outside the buffer zone. That doesn't mean the Act  
9 as applied is unconstitutional.

10 And we actually managed to find a case that  
11 basically says that, a Second Circuit case. It happens to  
12 be involving a time, place or manner restriction that said  
13 street musicians can play in subway stations but they can't  
14 use amplifiers. And given the noise levels down there the  
15 plaintiffs are saying, well, that's no good. And the  
16 Metropolitan Transit Authority, part of their response was,  
17 well, there are adequate alternative channels of  
18 communication. Go above ground and play wherever you want  
19 in public places.

20 Plaintiffs argued, well, that's not adequate  
21 because, you know, it rains and it snows and there are a lot  
22 of times we just can't be out and play music. And the  
23 Second Circuit held as a matter of law that the fact that  
24 inclement weather happens and can make an alternative  
25 channel less desirable does not mean that the alternative



1 channel is inadequate constitutionally.

2 But in any case, here, since we're -- everything is  
3 above ground, it's even easier than the Second Circuit case  
4 because whether there was a buffer zone there or not, the  
5 snow piles are the snow piles and the Act just has nothing  
6 to do with it.

7 Your Honor, finally, plaintiffs are arguing a very  
8 small question of state law that has nothing to do with the  
9 one remaining federal constitutional question. This has to  
10 do with the Worcester clinic. Plaintiffs you heard this  
11 morning are saying that the buffer zone on the Pleasant  
12 Street side they contend is not allowed under the Act  
13 because they contend that the walkway going through that  
14 narrow gap in the metal fences is not an entrance, only the  
15 actual door to the building is an entrance and so the buffer  
16 zone shouldn't be there.

17 And as you will see when you review our findings,  
18 we make two main -- ask the Court to make two main findings  
19 in response, we make two main points in response.

20 No. one, first it's not so obvious that plaintiffs  
21 are right. The Act doesn't define "entrance." It certainly  
22 doesn't define it as a door of the building. In the normal  
23 meaning of the word "entrance," an egress that allows access  
24 would seem to cover not just a door in a building but that  
25 narrow gap in the fences that people have to walk through.

1 But our main point is this is beside the point.

2 First of all, it's a question of state law, not a  
3 question of federal constitutional law.

4 Secondly, there has never been a claim in the  
5 complaint or the amended complaint that any buffer zone as  
6 drawn violates the Act.

7 And, thirdly, the record evidence demonstrates that  
8 none of the defendants in this case, neither Attorney  
9 General Coakley nor the three District Attorneys for Suffolk  
10 and Worcester and Hampden Counties have any responsibility  
11 for the drawing of buffer zone lines. That's done by local  
12 municipal officials, typically Public Works people. So if  
13 they had a claim, it would be a state law claim. It  
14 wouldn't be against this defendant and it's certainly not  
15 part of this case.

16 And so the Court doesn't need to decide whether  
17 they're right or not in order to resolve the one narrow  
18 remaining question, which is are there adequate ways for  
19 plaintiffs outside the buffer zone near the Boston,  
20 Worcester and Springfield clinics to offer their message in  
21 a way that passersby can see it and hear it and if the  
22 passersby want to stop and get literature from plaintiffs or  
23 want to converse with them or want to ask Dr. Shea to tell  
24 them why he's wearing the sign that says, "They're killing  
25 babies here," can they do that? The evidence shows that

1 they can.

2 And so, Your Honor, given the prior ruling in this  
3 case, given what the record evidence shows, we're asking the  
4 Court to declare that the Act not only on its face but also  
5 as decided in this phase as applied is constitutional.

6 **THE COURT:** Thank you.

7 Do you want to be heard some more?

8 **MR. DePRIMO:** Thank you, Your Honor.

9 An as applied challenge considers the facts in real  
10 life. Snow is part of real life. Escorts is part of real  
11 life. Moving traffic is part of real life.

12 I'm going to address counsel's points I think in  
13 reverse, it may be easier.

14 With respect to the Worcester clinic, the  
15 government says that it's not relevant whether or not the  
16 walkway is an entrance or not and that that buffer zone is  
17 really just a question of state law that the Court need not  
18 address.

19 The question in this case, the only remaining issue  
20 in this case is whether there exists ample alternative  
21 avenues of communication. By the way, the standard is  
22 ample, Your Honor. It's not merely adequate. It's not  
23 merely that there are alternatives available somewhere. The  
24 question is are they ample in order for the speaker to  
25 effectively convey his or her message to the intended

1 audience. That's the issue.

2 The plaintiffs could rent billboards. The  
3 plaintiffs could rent an airplane and have an airplane pull  
4 a banner. The plaintiffs can take out television ads. The  
5 plaintiffs can go with a megaphone on the Boston Common.  
6 Certainly those are alternative avenues of communication but  
7 they won't be effective for the plaintiffs to try to reach  
8 the people they're trying to reach at abortion clinics at  
9 the time and place that they're trying to reach them.

10 Now, with respect again to the Worcester clinic and  
11 whether or not --

12 **THE COURT:** Now, who says they won't be effective?  
13 What is the basis for your assertion that they won't be  
14 effective?

15 **MR. DePRIMO:** As I pointed out earlier in my  
16 PowerPoint presentation, Your Honor, the testimony of the  
17 plaintiffs and the government witnesses is that they cannot  
18 effectively reach people -- the government's position is it  
19 doesn't matter whether or not people actually hear your  
20 message. The mere fact that they can hear you is enough.

21 The government --

22 **THE COURT:** I didn't get that argument.

23 **MR. DePRIMO:** Pardon?

24 **THE COURT:** I didn't hear him say that.

25 **MR. DePRIMO:** Okay. For example, Mr. Salinger had

1 mentioned that he had heard that Ms. Metzger had heard  
2 people calling out from across the street in Worcester.  
3 Well, that may be. But Ms. Metzger also testified that when  
4 she was standing right on Alcorn Street when those three  
5 women were counseling that young woman on the corner, she  
6 heard them, she heard voices but she couldn't make out the  
7 words that they were speaking.

8 And the uniform testimony in this case is that the  
9 only way to effectively convey an abortion message at an  
10 abortion clinic is through close, personal communication.

11 Do people see signs? Of course they see signs. As  
12 Mr. Salinger pointed out, most of the --

13 **THE COURT:** But you can't -- the fact that there  
14 may be these boundaries doesn't justify entering private  
15 property.

16 **MR. DePRIMO:** Oh, of course not, Your Honor.  
17 That's precisely the point. As a matter of fact, I'm going  
18 to sort of jump ahead a little bit and address your point.

19 **THE COURT:** Well, do it as you are prepared. Don't  
20 let me get you all jumbled.

21 **MR. DePRIMO:** Well, I'm just sort of rebutting so I  
22 can do it this way.

23 **THE COURT:** Go ahead.

24 **MR. DePRIMO:** Mr. Salinger pointed out that at the  
25 Worcester clinic, for example, it's about 325 feet from the

1 entrance of the driveway to the main door at Planned  
2 Parenthood and that's private property. Yes, it is private  
3 property.

4 Do the plaintiffs have the right to go on private  
5 property? Absolutely not. But the Court, and the  
6 government actually, must consider those real life  
7 circumstances in determining whether or not ample  
8 alternative avenues exist with respect to the buffer zone.

9 The fact of the matter is -- and I didn't hear  
10 Mr. Salinger mention this. He stayed away from this  
11 particular point. It's virtually impossible to hand  
12 literature to people unless they pass by you.

13 As a matter of fact, one of the -- the testimony of  
14 Ms. Metzger in her deposition was that she had come out of  
15 the Boston clinic, took a left and started walking down  
16 toward sort of the center of Boston. And as she exited the  
17 buffer zone, there was a pro-lifer there and that pro-lifer  
18 right next to her path offered her a piece of literature.  
19 And what did Ms. Metzger do? She reached out and she took  
20 it.

21 Your Honor, we've all been in that circumstance.  
22 We're walking down the street and some leafleteer, some  
23 handbiller no matter what, it doesn't matter what he's  
24 trying to do, it might be trying to sell a product. It  
25 might be political. It doesn't matter. If the person is

1 standing right next to our path and we're walking by, what's  
2 our instinct? Our instinct is to reach out and grab it.  
3 Maybe we'll look at it. Maybe we won't. But the fact of  
4 the matter is that leafleteer was able to get it into the  
5 hands of the recipient.

6 When we see somebody who is 35 feet away,  
7 handbiller, and we're walking down the street, we don't make  
8 an effort to walk over to that person. That's just human  
9 nature. But if the person is right there right in our path,  
10 we'll reach out and we will grab that piece of paper.

11 What is significant about this is what the Court  
12 said in Hill v. Colorado. Hill v. Colorado was merely an  
13 8-foot buffer. It was a floating buffer. And the Court  
14 emphasized that that 8-foot buffer could be problematic with  
15 respect to literature distribution.

16 But then the Court noted that on that statute  
17 nothing prohibited any leafleteer from standing right next  
18 to the path of passersby and offering their literature so  
19 somebody can come out and grab it. That's what is absent in  
20 many instances in this case.

21 Can the plaintiffs reach some people? Of course  
22 they can, Your Honor. There has never been any dispute that  
23 the plaintiffs can talk to people outside any of these  
24 clinics.

25 **THE COURT:** Well, how many do you deem to be the

1 requirement in order to pass constitutional muster?

2 **MR. DePRIMO:** Well, the standard that the Supreme  
3 Court uses is ample alternative avenues of communication.

4 **THE COURT:** I know but how do you define that?

5 **MR. DePRIMO:** I don't know how to define it, Your  
6 Honor, but I can say this to the Court.

7 **THE COURT:** Well, do you have a suggestion?

8 **MR. DePRIMO:** My suggestion is this, my suggestion  
9 is this:

10 When it's one percent of the people that you're  
11 trying to reach give you any response at all, that's not  
12 enough. When 99 percent of the people you're trying to  
13 reach don't even bother to look your way, and Mr. Salinger  
14 characterizes those people as simply unwilling listeners,  
15 they don't want to pay attention to you. Well, Your Honor,  
16 the fact of the matter is people have the right to  
17 communicate to unwilling listeners as well.

18 Now, if you put somebody far enough away from an  
19 unwilling listener --

20 **THE COURT:** But you don't have a right to a  
21 response.

22 **MR. DePRIMO:** They don't have a right to a  
23 response, that's true. I agree with that. The fact of the  
24 matter is there are many people outside the buffer who may  
25 be approaching the abortion clinic, for example, in Boston



1 from the same side that Eleanor or Jean is on and Jean is  
2 able to talk to that person before they get into the zone.

3 And as Mr. Salinger pointed out, many of these  
4 people may just say I don't want to talk to you, I don't  
5 want your literature. And, of course, that's their right.  
6 They don't have to talk to Eleanor or Jean or anybody else.  
7 They can just move on by.

8 But the fact of the matter is, Your Honor, speakers  
9 have the right to be able to try. And when somebody is 60  
10 feet on the other side of a buffer zone, and as  
11 Mr. Salinger pointed out when he was talking about Dr. Shea,  
12 when you're in that buffer zone, you better not mention the  
13 word "abortion" because if you do, buddy, you're going to  
14 jail. That's basically the attitude of the government.

15 So if Eleanor is on one side of the zone and  
16 somebody is approaching from the other, Eleanor can't go  
17 through that zone silently and reach that person before that  
18 person walking toward her actually gets into that zone and  
19 likely inside the clinic.

20 I don't know, Your Honor, exactly how much is  
21 required but I'm pretty confident that when you can't reach  
22 99 percent of the people you're trying to reach, that means  
23 that alternative avenues aren't ample.

24 **THE COURT:** Reach or convince?

25 **MR. DePRIMO:** Not reach at all, Judge. The fact of

1 the matter is if you're a hundred feet away from somebody  
2 and you're calling from a hundred feet away and you're  
3 behind a metal fence, I mean, how could somebody possibly  
4 effectively communicate to somebody under those particular  
5 circumstances? It's simply not possible.

6 Can their voices possibly be heard? Sure. But as  
7 Mark pointed out, when he's on that fence and he's calling  
8 out, he doesn't know whether or not people have heard him.  
9 He doesn't know whether or not they understood his words.  
10 Maybe they heard something.

11 How does somebody know who is walking from the  
12 Planned Parenthood clinic in Worcester, for example? They  
13 pull into the parking lot, they get out of their car and  
14 they start walking to the main door. There is a fence  
15 between Mark and this person. There is a fence between  
16 Nancy and this person. This woman hears a voice, this man  
17 hears a voice who is going into Planned Parenthood. They  
18 have no idea who this person is. They can't see this  
19 person. They hear a voice. They may hear something. This  
20 person doesn't necessarily even know that the person across  
21 the street or on the sidewalk is trying to reach her. All  
22 she does is hear a voice if, indeed, she hears it at all.

23 Getting back, Your Honor, to the walk-away in front  
24 of the Worcester clinic where Mr. Salinger said it's  
25 irrelevant as to whether or not this is a legitimate buffer

1 zone. He points out that the word "entrance" is not defined  
2 under the statute.

3 Well, I have got two responses for that. If that's  
4 true, then perhaps the statute is unconstitutionally vague  
5 if, in fact, somebody can put a buffer zone around something  
6 that clearly is not properly a buffer zone.

7 No. two is the word "driveway" is part of the  
8 buffer law. 35-foot radius around entrances, exits and  
9 driveways. Well, clearly a driveway provides ingress and  
10 egress in and out of the facility. There is no question  
11 about that.

12 So putting the word "driveway" in the statute would  
13 make it superfluous if they meant the word "entrance" to  
14 mean simply ingress and egress. So I think Mr. Salinger's  
15 argument fails there.

16 Now, the point that I raised that is because it  
17 impacts alternative avenues of communication. When Mark  
18 stands at the edge of that buffer zone, the closest he can  
19 get is 75 feet. If the buffer zone is not there, at least  
20 he can stand in front of that fence on the public sidewalk.  
21 Is he still a good distance away? Yes, he is. He is 53  
22 feet from the door to the public sidewalk. I believe that  
23 that's the accurate figure.

24 Well, Your Honor, life is hard. I concede that.  
25 He has no right to be closer if it's private property and

1 Planned Parenthood doesn't invite him on. But the  
2 government shouldn't compound it. The government's attitude  
3 is, well, you know, you can't hear from fifty -- if it's too  
4 hard to hear from 53 feet, what difference does it make if  
5 you're a hundred feet away.

6 Well, that's not the answer that the government  
7 should be giving. The fact of the matter is is that buffer  
8 zone is clearly unlawful under the law, the one that's on  
9 the Pleasant Street side of Worcester, and that directly  
10 impacts the ability of the plaintiffs to be able to have at  
11 least the best alternative or one of the best alternatives  
12 that they can have on Pleasant Street. It completely takes  
13 it away.

14 Snow. Snow is a fact of life. But all of these  
15 circumstances of life have to be considered on an as applied  
16 challenge. If the snow is such that somebody can't get to,  
17 somebody is unable to reach an intended audience, that's at  
18 least a fact that should be considered.

19 Now, Your Honor had made an excellent point earlier  
20 and that is that the snow is on the ground and you can't see  
21 the buffer zone. Then perhaps it truly, you know, you truly  
22 cannot enforce it.

23 But as I was thinking over lunch, clearly we know  
24 that the buffer zone is 35 feet away from the driveway. And  
25 we know that it's an arc. And it may be very difficult to

1 determine exactly where that arc is in the middle of the  
2 street. But even if the snow is completely covering the  
3 buffer zone lines on the sidewalk next to the driveway, it  
4 would seem to me it would be a tough argument to make to a  
5 judge that, hey, Judge, the snow was on the sidewalk, I  
6 didn't know where the buffer line was.

7 If somebody knows it's 35 feet from the edge of the  
8 driveway and they're standing within two feet of the edge of  
9 the driveway, it seems to me that the fact that there is  
10 snow there wouldn't be a very good defense with respect to,  
11 you know, not knowing where the buffer line was.

12 **THE COURT:** I don't want to try that case with you  
13 back and forth, we could spend the rest of the afternoon --

14 **MR. DePRIMO:** Yes. I'm going to move along.

15 **THE COURT:** I think I could make a contrary  
16 argument that might --

17 **MR. DePRIMO:** I'm going to move on with respect to  
18 that, with respect to that particular point.

19 Escorts. Mr. Salinger apparently misunderstood  
20 what I was saying with respect to Hoye. Hoye did not say  
21 that escorts are agents of the state. What Hoye said was  
22 that it's irrelevant whether or not they're agents of the  
23 state.

24 And as far as McGuire II is concerned, what the  
25 McGuire II court, probably McGuire I held as well as

1 McCullen held, was that escorts are not agents of the state.

2 Well, that's true and we don't contend that  
3 particular point. We are not saying that escorts are agents  
4 of the state. What we're simply saying is that the fact  
5 that the escorts are there and they're interfering with the  
6 ability -- with the attempts of the plaintiffs to reach  
7 their intended audience is a fact, one of the facts that the  
8 Court should consider.

9 McGuire II was an as applied challenge but ample  
10 alternative avenues of communication was not an issue in  
11 McGuire. So the First Circuit has not addressed whether or  
12 not the factual impact that escorts have in real life on the  
13 ability of a speaker to reach their intended audience -- I'm  
14 losing my train of thought here.

15 The First Circuit has not addressed that particular  
16 point.

17 But the fact of the matter is on an as applied  
18 challenge the Court considers all of the circumstances, all  
19 of the facts surrounding the speaker's ability to reach the  
20 audience. And in real life in Boston escorts are part of  
21 that analysis. That's what Hoye stands for.

22 Hoye simply says that, hey, look, you can't ignore  
23 the fact that the escorts are there and the escorts are  
24 interfering with this, with Hoye's attempts to communicate.

25 With respect to normal conversational distance, the

1 reason I raised that point, Your Honor, is that we are in an  
2 as applied challenge here. We are considering specific  
3 facts. And there may not be any particular right to a  
4 normal conversational distance under the Constitution.  
5 However, Ms. Metzger said that a normal conversational  
6 distance was two to three feet. Both she and  
7 Mr. Baniukiewicz made plain that when they're discussing  
8 important matters or they're talking in a friendly manner to  
9 somebody, they do it face-to-face close together.

10 And that's the problem with the buffer zone. These  
11 are very important matters that the plaintiffs are trying to  
12 discuss with their intended audience on a very critical  
13 issue to the lives of these women going into the clinic.  
14 And it's not something that can be done effectively from 35  
15 or 50 feet away. It simply can't happen.

16 In real life, Your Honor, we don't talk that way.  
17 None of us have regular conversations with people from a  
18 distance of 20, 30, 40, 50 feet. We talk to somebody  
19 generally face-to-face, two feet, three feet, four feet  
20 away. And that's what the plaintiffs say is effective in  
21 trying to persuade women --

22 **THE COURT:** Is that where you say that I should go  
23 with the decision here? We should have boundaries limited  
24 to three or four feet?

25 **MR. DePRIMO:** What I am saying, Your Honor --

1           **THE COURT:** No, but, I mean, if the answer to that  
2 is no, say no, give me some relief.

3           I mean, you argue three or four feet. You are  
4 talking about conversational tones, which is a very  
5 legitimate argument. I just wondered if you take the next  
6 step, is that the remedial step that I have to take?  
7 Recognize that practical aspect of the conversation?

8           **MR. DePRIMO:** I think that under the facts of this  
9 particular case, we're talking about the evidence in this  
10 particular case.

11           When we're talking about the facial challenge, as  
12 the First Circuit said, the First Circuit said can we  
13 envision a circumstance in which a 35-foot buffer zone could  
14 be constitutional? Sure.

15           What if, in Boston, for example, that door is  
16 recessed 12 feet from the public sidewalk? What if it was  
17 recessed 35 feet from the public sidewalk?

18           The buffer zone would be the entire recessed  
19 walkway so that speakers, leafleteers would be able to stand  
20 right at the edge of that door, right at the path of where  
21 people were going in and out and be able to hand out that  
22 literature and be able to talk to people from that short  
23 conversational distance and not violate the buffer zone.

24           So are there circumstances under which a 35-foot  
25 buffer zone would be constitutional? Yes, but in my view



1 the circumstances are extremely narrow and certainly not in  
2 any of the buffer zones that are challenged in this  
3 particular case.

4 **THE COURT:** Okay.

5 **MR. DePRIMO:** With respect to safety, Your Honor,  
6 we didn't bring that up to challenge the Court's prior  
7 ruling on the facial challenge with respect to whether or  
8 not there are safety occurrences or whether or not the  
9 buffer zones enhances public safety versus actually creates  
10 hazards. That's not what we're saying.

11 We're saying this -- and Mr. Salinger made the  
12 correct point, the same point we're trying to make -- a  
13 speaker has a choice. The speaker can stand at the edge of  
14 that buffer right in the direct path of traffic, that's  
15 choice No. one, and then be, I think we said 22 or 26 feet  
16 from the open foyer, all right.

17 Or, if that person is safety conscious, that person  
18 can retreat and go across the street and stand on the public  
19 sidewalk in front of Star Market. What does that do? That  
20 adds another 22 or 23 feet to the buffer zone. So the  
21 buffer zone is not 35 feet anymore, the buffer zone in real  
22 life there is now 60 feet.

23 That's the point we were making with respect to the  
24 vehicles. It forces safety conscious speakers to actually  
25 get pushed farther back from the area, the entrance to the

1 door. That's the point that we were making with respect to  
2 safety. And that's actually compelling, Your Honor.

3 And as far as Madsen is concerned, Madsen is a  
4 distinguishable case in this respect. Madsen was an  
5 injunction case. The facts were extremely messy. You had  
6 trespass. You had obstruction. You had harassment. You  
7 had a terrible factual record. All kinds of arrests.  
8 Blocking, all right.

9 Your Honor, there is no evidence whatsoever, none,  
10 zero, of any illegal activity in this case. There is no  
11 allegation of trespass. There are no allegations of  
12 obstruction. There are no allegations of harassment. There  
13 are no allegations of any criminal activities whatsoever.  
14 We're talking about law-abiding citizens in this case. And  
15 Madsen dealt with lawbreakers. So those are two very  
16 different cases.

17 With respect to Sullivan, it is true that Sullivan  
18 talked in terms of the general dissemination of a message.  
19 And if there are other outlets than the one that you're  
20 seeking, then it satisfies, supposedly, according to the  
21 government's reading, it satisfies the standard for ample  
22 alternative avenues of communication.

23 If this Court reads Sullivan the way the government  
24 would ask them to read it, meaning that as long as there is  
25 some type of outlet for the general dissemination of the

1 message, then the First Circuit would be in conflict with  
2 five of its sister courts. Five circuits as I pointed out  
3 during my PowerPoint presentation have ruled that avenues of  
4 communication are not adequate or ample if, in fact, a  
5 speaker cannot reach his or her intended audience.

6 And that's what the evidence has been all about  
7 today, Your Honor. It's the ability to try to reach this  
8 particular person, okay, who's making literally, literally a  
9 life and death decision. Somebody may die in this case,  
10 Your Honor, not in this case. If a woman is going into  
11 Planned Parenthood to abort her baby, there is going to be a  
12 death of a human being at that point.

13 And all we're saying is is that under those  
14 circumstances there needs to be an opportunity for true,  
15 effective communication. Sure, people can see a sign. For  
16 example, as Mr. Salinger pointed out, Dr. Shea wears a sign.  
17 He wears a sign that says, "They're killing babies here."  
18 That's a very simple statement and it's very easily  
19 understood.

20 But Dr. Shea also seeks to tell people about human  
21 gestation. He also seeks to tell them about the risks of  
22 surgery. And those two messages are very different than the  
23 simple message he has on his sign.

24 So, sure, signs can be used to convey certain  
25 messages. They cannot be used to convey others.

1 I think what's most significant about this case,  
2 and I didn't hear the government really touch upon this --

3 **THE COURT:** What about this particular audience  
4 argument you are making? In other words, the intended  
5 audience of the speaker, that message has to reach those  
6 ears and no others? Maybe the rest of the Commonwealth ears  
7 but that one person that is the intended audience, or part  
8 of it -- well, yes, that was the intended audience doesn't  
9 hear and that makes it fail?

10 **MR. DePRIMO:** I think City of Ladue versus Gilleo,  
11 which was a U.S. Supreme Court case, speaks to that. In  
12 that case, if I remember my facts correctly, a woman wanted  
13 to put in the window of her house some kind of a little sign  
14 that said something about, I believe, the war in the Gulf.  
15 She was opposed to it. And there was an ordinance in the  
16 City of Ladue that said you can't have any signs, any  
17 residential signs. And the court went to great pains to  
18 say, you know, sometimes a particular place and a particular  
19 message is extremely important.

20 Who is this woman trying to reach when she put that  
21 sign in her window? The court said she was trying to reach  
22 her neighbors. She wasn't trying to reach the people  
23 downtown. She was trying to reach her neighbors. And the  
24 Court ruled that that ordinance of the City of Ladue was  
25 unconstitutional.

1           And as they point out, you know, certainly there  
2           are other avenues of communication. She could have took out  
3           an ad in the newspaper. She could have gone and protested  
4           down at City Hall. There are lots of things that she could  
5           have done but she wanted to reach her neighbors. And the  
6           Supreme Court said she had a right to do that and that's why  
7           that City of Ladue ordinance was unconstitutional.

8           **THE COURT:** Okay. You may have touched on this, I  
9           don't think so, what about his argument that there is, in  
10          these multitask buildings that there is no way that your  
11          client could know which office the intended recipient of the  
12          conversation was going to?

13          **MR. DePRIMO:** Well, if you're standing by the  
14          driveway and you're able to beckon somebody to roll down  
15          their window --

16          **THE COURT:** They don't roll the window down.

17          **MR. DePRIMO:** Sure. I understand that, Your Honor.  
18          If people don't want to roll the window down, then these are  
19          unwilling listeners and neither Dr. Shea or anybody else has  
20          the right to force their communication on --

21          **THE COURT:** No, but, I mean, just the idea -- I am  
22          going to read that case again, the Ninth Circuit case.

23          **MR. DePRIMO:** The Hoye case?

24          **THE COURT:** Hoye, yes. Just because a building has  
25          six or seven or ten offices, that doesn't make it

1 constitutionally suspect; does it?

2 **MR. DePRIMO:** Actually, Your Honor, the Hoye case  
3 was quoting the United States Supreme Court.

4 **THE COURT:** You said that, yes.

5 **MR. DePRIMO:** The U.S. Supreme Court said that wide  
6 entrances or multipurpose buildings create a problem that  
7 the court needed to look at very, very closely.

8 I don't know, I don't recall as I'm standing here  
9 whether or not they used the term "constitutionally  
10 suspect." They may have or that may simply have been me.

11 But there is no question that in Hill v. Colorado  
12 they said that when you've got a multipurpose office  
13 building, that's going to have an as applied challenge and  
14 the Court has to look very, very closely at it there.

15 **THE COURT:** Okay.

16 **MR. DePRIMO:** Now, again, with respect to -- and I  
17 don't know if I answered His Honor's question, but with  
18 respect to the inability to identify people who are going  
19 into the clinic --

20 **THE COURT:** Yes, go ahead.

21 **MR. DePRIMO:** -- and which business they're going  
22 to patronize, that's why you need to be close to the  
23 driveway so that you can ask people coming in, for those  
24 people who choose to roll down the window and talk with you,  
25 then you can find out where they're going to patronize.

1           For those people who choose to just pass on by, and  
2           many people do, I don't dispute that there are many, many  
3           people, Your Honor, who would choose even if you're standing  
4           at the driveway to just kind of go on in and don't want any  
5           literature, they don't want to hear anything, and that's  
6           their right. You can't force anything upon them.

7           But the fact of the matter is is that we don't know  
8           how many of those folks are willing listeners as compared to  
9           unwilling listeners. What we know is --

10           **THE COURT:** But you don't even know which ones of  
11           them are the audience.

12           **MR. DePRIMO:** We don't, and that's why everybody is  
13           the audience. That's the problem. That's why we have such  
14           a problem in Springfield.

15           If we simply talk about the west driveway on Wason  
16           Avenue, the driveway that's right in front of Planned  
17           Parenthood, anybody who goes in that driveway, we'll assume  
18           for the moment for purposes of my argument that they're  
19           going into that building. Well, there are six or seven or  
20           eight businesses in there so we don't know whether or not  
21           they're going to Planned Parenthood. They could be going  
22           into any of those.

23           But the only way to determine that is to have a  
24           conversation with people. And the problem with the buffer  
25           zone is it puts the onus on the recipient. The recipient

1 has to go park the car and then walk all the way back to the  
2 sidewalk.

3           You know, there are many willing listeners who  
4 would be willing to stop, roll down the window, as  
5 Ms. Metzger pointed out, you know, you roll down the window,  
6 you take some literature, you talk briefly. It only takes a  
7 couple of moments. It doesn't take much effort on the part  
8 of somebody. But these same people who might be willing to  
9 roll down their window and accept literature and talk are  
10 not going to park their car and then walk back perhaps 100  
11 or 150 feet to talk to somebody out on the sidewalk. And  
12 that's what the problem is.

13           The government's own witness, the security chief  
14 for Planned Parenthood, Michael Baniukiewicz, said the only  
15 opportunity for pro-life communication is at the driveway in  
16 front of Planned Parenthood. The fact of the matter is  
17 there shouldn't be buffer zones at any of those other  
18 driveways for any reason.

19           As a matter of fact, Mr. Baniukiewicz made clear  
20 that the security cameras for Planned Parenthood were only  
21 on two driveways, one being the one on west Wason Avenue,  
22 the west driveway on Wason and then the main entrance.

23           Now, somebody must have thought that those other  
24 three driveways should have buffer zones around them because  
25 somebody painted those lines on the street and presumably it



1 was the City of Springfield. They own the streets, unless  
2 they're state streets and then the defendants clearly are  
3 obligated.

4 I don't know whether or not Main Street is owned by  
5 the City of Springfield or by the State of Massachusetts;  
6 but, nevertheless, a government entity owns that street.  
7 They painted the lines and they left those lines there.

8 Now, the government wants to put the burden on  
9 Dr. Shea. Dr. Shea, there is no sign right within the arc  
10 of three of those zones, you should know that you can't be  
11 charged if you walk there. Well, you know, Dr. Shea was  
12 able to practice medicine for 40 years and those buffer  
13 zones confused him.

14 And the fact of the matter is at least since this  
15 past February the government has known that those driveways  
16 have been at issue and the government has not informed me or  
17 Dr. Shea or anyone else that I know of that those buffer  
18 lines should be covered up or marked over or painted over or  
19 signs posted saying this is not a real buffer zone.

20 The fact of the matter is for the last eight months  
21 the government has allowed Dr. Shea to be under the  
22 impression that he may or he may not be arrested if he goes  
23 in three of those five zones.

24 We're not asking the Court to order the State of  
25 Massachusetts to paint over those lines or the City of

1 Springfield. We're asking the Court to enjoin the  
2 prosecutor for the County of Hampden, the one who would  
3 prosecute the buffer law at those locations, enjoin them  
4 from being able to prosecute the buffer law in those three  
5 places. That's perfectly appropriate in this particular  
6 case.

7 And the fact is if the government concedes, as they  
8 have, that those are not real buffer zones, it seems to me  
9 that the government wouldn't have any problem with an order  
10 from this Court saying that the buffer zone can't be  
11 enforced at those three locations.

12 With respect to the difference -- I may have  
13 touched on this but I have it in my notes and I'm working  
14 backwards.

15 With respect to the 325 distance at Worcester  
16 between the edge of the driveway and the main door, it is  
17 private property. Can the plaintiffs go on there? No, they  
18 can't. Planned Parenthood can exclude from their property  
19 anybody that they want to. But that's a fact of real life  
20 in this case.

21 The only opportunity on Dewey Street, and perhaps  
22 anywhere, for the plaintiffs to be able to talk to somebody  
23 effectively is at that driveway entrance on Dewey Street.

24 Your Honor, the 325 feet is a natural buffer zone,  
25 right? Once they pass there, there is 325 feet between the

1 pro-life people on the public sidewalk and that main door.  
2 We don't have to have another 35 feet. If that's all we  
3 need, and I believe that the government said, Mr. Salinger  
4 said that all they want to do is make sure it was clear,  
5 clear for passage at the driveway on Dewey Street.

6 Well, you don't have to have people standing 35  
7 feet away from the driveway's edge in order to make sure  
8 cars can go in or out. You just have to stand a foot or two  
9 feet from the edge.

10 The fact of the matter is, Your Honor, in Worcester  
11 there really is no opportunity to effectively communicate a  
12 message. It is just not possible.

13 The fact that somebody may hear a voice, I was  
14 actually astounded, Your Honor, when Mr. Salinger trumpeted  
15 the fact that one person came out and spoke with Nancy  
16 Clark. In a year and a half Nancy was able to speak with  
17 one person. That proves she can effectively convey her  
18 message.

19 The fact that Mr. Bashour was able to speak with  
20 six or seven people in a period of a year and a half  
21 demonstrates his message is effective.

22 That Eleanor McCullen may have been able to  
23 convince 80 women not to abort, and I'm not so sure that's  
24 in the record, I'm going to have to go back and look; but,  
25 nevertheless, let's assume for purposes of argument that

1 that is in the record. We also know that there are 2,000  
2 women or thereabouts that she was not able to reach because  
3 these women were either on the opposite side of the zone or  
4 whatever. The fact of the matter is that she's entitled to  
5 be able to convey her message and reach her audience in  
6 pretty much every instance.

7 Now, with respect to Mrs. McCullen perhaps going  
8 out there with a woman named Mary Donovan I believe or Mary  
9 O'Donnell, I believe that's -- Mr. Salinger raised that.  
10 Mrs. McCullen's First Amendment rights are her own. What  
11 the government is trying to do is force her to exercise her  
12 First Amendment rights vicariously through somebody else.  
13 Basically their argument is, well, if you're on one side of  
14 the zone and Mary O'Donnell is on the other side, well,  
15 there you go, you've got the whole zone covered.

16 Well, that's not good enough. Mrs. McCullen's  
17 First Amendment rights are her own and the government can't  
18 force her to exercise those rights through somebody else.

19 Neither are messages fungible, because it sounds  
20 like, as I was listening, that the government was saying,  
21 well, you know, we hear all these different -- we see all  
22 these different signs and we hear all these messages. And  
23 it seems to me that the import of that is, well, you know,  
24 if you've heard one pro-life message, you've heard them all.  
25 It doesn't really matter which one you hear.

1 Well, that's not the law either. The law is a  
2 particular individual has a right on his or her own to  
3 express his or her own message. So the fact that there are  
4 other people out there and they're able to convey messages  
5 and they --

6 **THE COURT:** In this situation you don't think that  
7 your clients -- I am not trying to have you violate any  
8 attorney/client relationship -- but is it their feeling that  
9 they want the message conveyed by them or are they happy  
10 just to have the message conveyed? Are they looking for  
11 results or are they looking for personal vindication?

12 **MR. DePRIMO:** Your Honor, the declarations in the  
13 record by the plaintiffs are clear that their message is  
14 often different from the messages of other people, that  
15 there are times they can be effective when another person  
16 cannot. So it's important that they be able to convey their  
17 message.

18 As I pointed out with Dr. Shea, he's a medical  
19 doctor. The information that he could provide to somebody  
20 with respect to medical issues is very different than what a  
21 non-doctor can provide. So the person conveying the  
22 message, the person's knowledge, the person's experiences  
23 and background, the person's delivery. Some people are very  
24 quiet and very gentle. Other people are very loud and  
25 boisterous. People respond differently to the way that the

1 message is delivered.

2 And as I quoted the Supreme Court earlier, the  
3 Supreme Court says the speaker knows best what to say and  
4 how to say it, not the government. Well, the government is  
5 telling this Court that it knows best because you can see  
6 people with different signs and people doing different  
7 things, the message must be effective. Well, that's simply  
8 not what the facts show in this case. The facts show that  
9 in order to effectively convey a message to be effective, to  
10 change people's minds, to persuade, you have to have close  
11 communication and that's lacking in this particular case.

12 **THE COURT:** Okay. Are you just about ready to wind  
13 it up?

14 **MR. DePRIMO:** I think so, Your Honor. I think I'll  
15 stop here. Thank you.

16 **THE COURT:** What about you, anything else?

17 **MR. SALINGER:** One very short point, Your Honor.

18 **THE COURT:** Go ahead.

19 **MR. SALINGER:** Plaintiffs suggested that although  
20 the alternative channels of communication available in this  
21 case may be adequate, they're not ample and that's not good  
22 enough because the constitutional standard requires ample  
23 alternatives, not adequate alternatives.

24 Your Honor, in our proposed findings we cite to not  
25 one but three different First Circuit decisions holding that

1 the essence of the question that the Court must decide is  
2 "whether the remaining communicative avenues are adequate."

3 That's paragraph 12 of our proposed findings,  
4 footnote 21, where we cite the Sullivan case, the DHL  
5 Associates case and the National Amusements case.

6 **THE COURT:** Okay, thank you. Very well done by  
7 everybody. I appreciated the very professional way in which  
8 you handled yourself. I will do the best I can with it.

9 I think what we should do is set up a schedule for  
10 these proposed findings of fact. You will probably want an  
11 updated transcript of this hearing. So when will they get  
12 that, Carol? Tomorrow morning?

13 (Laughter.)

14 (Whereupon, the Court and the court reporter  
15 conferred.)

16 **THE COURT:** She expects you will have the  
17 transcript of this hearing three weeks from today or  
18 thereabouts. And then it seems to me if I give you a month  
19 after that to give me further proposed findings of fact  
20 reference to the record, and I will take it under advisement  
21 at that point. Does that seem all right?

22 **MR. DePRIMO:** Yes, Your Honor.

23 **MR. SALINGER:** You do have ours, Your Honor. We  
24 will see what is --

25 **THE COURT:** Well, you want to make sure that

1 they -- that is why I don't like to have them before the  
2 case is over because sometimes they just don't quite get the  
3 nuances.

4 You look it over and if you are satisfied --

5 **MR. SALINGER:** If we need to supplement, we will.

6 **THE COURT:** Yes. If you are satisfied, just send a  
7 little note saying you are satisfied.

8 Anything else?

9 **MR. DePRIMO:** Your Honor, could we have a hard date  
10 as to when they're due?

11 **THE COURT:** Yes. Three weeks from today is what?

12 **THE CLERK:** September 14th.

13 **THE COURT:** September 14th the transcript will be  
14 available. And then 30 days after that?

15 **THE CLERK:** October 12th.

16 **THE COURT:** October 12th proposed findings. Is  
17 that enough time?

18 **MR. DePRIMO:** That's fine with us, Your Honor.

19 **MR. SALINGER:** Yes, Your Honor.

20 **THE COURT:** October 12th.

21 All right. Is that it?

22 **THE CLERK:** Yes, Judge.

23 **THE COURT:** Okay. Thank you very much. You are  
24 all excused.

25 **THE CLERK:** All rise for the Honorable Court.



Court is in recess.

(WHEREUPON, the proceedings were recessed at 2:45  
p.m.)

C E R T I F I C A T E

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/CAROL LYNN SCOTT

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DATE: October 5, 2011